

IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE, COOKEVILLE DIVISION

ILIGHT TECHNOLOGIES, )  
Plaintiff, )  
)  
v. ) CASE NO. 2:06-0025  
)  
FALLON LUMINOUS PRODUCTS, )  
Defendant. )

TRANSCRIPT OF PROCEEDINGS

VOLUME VIII

DATE: APRIL 29, 2009

TIME: 9:00 A.M.

BEFORE: HONORABLE WILLIAM J. HAYNES, JR.

And a Jury

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A P P E A R A N C E S:

For the Plaintiff: Timothy J. Vezeau  
Stephen Price  
Melissa Hunter  
John Scruton  
William Ferrell

For the Defendant: Mark Kittredge  
Jonathan Rose  
Samuel Lipshie  
Douglas Sawyer  
Brandy McMillion

08:37:46 1

P R O C E E D I N G S

08:58:37 2

THE COURT: Before we get started, I received a note from a juror this morning that I will read to you, and you can see it if you want to.

08:58:45 5

08:58:51 6

Judge Haynes, I'm requesting to leave no later than 5:00 p.m. today, as I have an appointment at 5:15. This appointment was originally scheduled last Wednesday, April 22, but I missed it as we stayed late that night. I rescheduled as late in the day as possible. Thank you for your consideration. Juror Number 6.

08:59:15 11

I'm going to tell the jurors that they are the judges of the facts, and judges get to set their own schedule. So if they want to leave at 5:00 today, that's fine with me. That means we'll come back.

08:59:28 15

Now, were there any further objections to the jury instructions, either side?

08:59:41 17

MR. VEZEAU: Not from the plaintiff, Your Honor.

08:59:41 18

MR. KITTREDGE: Nor from the defense, Your Honor.

08:59:55 19

THE COURT: All right. Now, there was an issue, outstanding issue, concerning whether there would be rebuttal argument on the defenses. I think the appropriate way to handle this is if the plaintiff would present its responses to the defendant's defenses as part of its opening statement.

24

And that way, when the defense gets to make its closing, it knows essentially what the arguments of the

1 plaintiffs are and can respond first to the plaintiff's theory  
2 and then can argue for its own defenses and respond to  
3 whatever comments that were made by the plaintiff about those  
4 defenses. And then the plaintiff's rebuttal would be limited  
5 to advocating the plaintiff's theory of the case.

09:00:37 6 If there were any matters stated in rebuttal that  
7 impacted the plaintiff's defenses -- that responds to the  
8 plaintiff's defenses, then we'll take up whether the defense  
9 should be allowed to respond further. But it would only be  
10 limited to the specific comment made about the defenses.

09:00:56 11 MR. VEZEAU: All right. So as I understand Your  
12 Honor, we'll cover everything in my opening, then if he says  
13 something that I particularly take issue with, I will come up.  
14 But it may be that I will have nothing further.

09:01:14 15 THE COURT: Well, if you do take issue, -- we'll just  
16 see what it is at the time. We'll deal with it at the time.

09:01:23 17 MR. VEZEAU: All I'm saying is I am following the  
18 Court's instructions.

09:01:27 19 THE COURT: All right. Are there any other matters,  
20 either side? Well, the jury -- the printers are a little slow  
21 up here, as are the computers. So you will get the jury  
22 instructions in due time. But are you all ready to have  
23 closing statements -- closing arguments?

09:01:41 24 MR. VEZEAU: Yes, Your Honor.

09:01:43 25 THE COURT: Now, by my estimation, based on what you

1 all told me, we're looking at probably two and a half to three  
2 hours of closing arguments, which means we'll probably end  
3 around noon without taking a break. I wonder -- the jury  
4 instructions are around 60 -- more than 50 pages, anyway, so I  
5 figure they will take about an hour to read. And if we take a  
6 lunch break at 12:00, that means the case doesn't get to the  
7 jury until about 2:00, which means, according to this juror's  
8 note, there will be three hours of deliberations. I don't  
9 know how long they are going to deliberate. But that's my  
10 estimate of the schedule. So does anybody take issue with  
11 that?

09:02:38 12 MR. KITTREDGE: No, Your Honor. We might be a little  
13 faster this morning, but otherwise that sounds right.

09:02:41 14 THE COURT: All right.

09:02:53 15 You can bring the jury in, Mr. Marshal.

09:03:17 16 (Jury in.)

09:03:18 17 THE COURT: Good morning, ladies and gentlemen of the  
18 jury. Before we get started today, I want to acknowledge a  
19 note received by the juror that I have shared with the  
20 parties, and it concerns how long you all stay today. And as  
21 I told you at the beginning, that there are basically two  
22 judges. I'm one of the judges, I'll tell you what the law is,  
23 decide what evidence comes in. The other judges are you. And  
24 you judge the facts. And judges usually set their own  
25 schedule. So I'm going to let you all set your own schedule

1 and ask you to accommodate the juror who requested to conclude  
2 by 9:00. Ask you all to consider that. It's early in the  
3 morning for me -- 5:00. So I will ask the jurors to discuss  
4 that amongst yourselves, and I will leave that to you all's  
5 discretion to honor the request of the other jurors. The  
6 Court is inclined to do so, but as I said, you all set your  
7 own schedules, okay? Does everybody understand that?

09:04:26 8 Now we're at the final stages of the trial. We will  
9 hear closing arguments. Closing arguments are a summary of  
10 what each side believes the proof has found and why you should  
11 find in their favor. We will start out with the plaintiffs,  
12 who will give their closing arguments. Then the defendants  
13 will give their closing arguments, and then, because the  
14 plaintiff has the burden of proof, the plaintiff the respond.  
15 It is expected that, during the course of this presentation,  
16 they will not only cover the plaintiff's claims but also the  
17 defendants defenses to those claims that the Court will  
18 instruct you on in its jury instructions.

09:05:00 19 We'll hear now from the plaintiff.

09:05:00 20 MR. VEZEAU: Thank you, Your Honor.

09:05:03 21 THE COURT: Remember that arguments of the lawyers are  
22 not evidence. They are only a summary of the evidence and  
23 what the evidence believes. If there is any difference  
24 between what the lawyer says the evidence is and what your  
25 recollection of what the evidence is, you are, of course, free

1 to follow your own recollection.

09:05:21 2 MR. VEZEAU: Your Honor, ladies and gentlemen of the  
3 jury, good morning.

09:05:26 4 This is iLight's closing argument, which is our  
5 opportunity to tell you, in summary form, that is, I'm not  
6 going to repeat everything everybody said in this trial, to  
7 everyone's relief. In summary form. I'm going to now relate  
8 to you what we believe the evidence in this trial has  
9 established.

09:05:47 10 And before I get into this in greater detail, we would  
11 certainly like to express our deep appreciation for the time  
12 and effort you have spent with us here today and for your  
13 patience in listening to the evidence that we presented to you  
14 over the past week.

09:06:03 15 Stripped to its core, this case contains a very basic  
16 principle that we learned very early in life. No one, no  
17 person, and no company, regardless of how rich and powerful  
18 that company may be, has the right to take what does not  
19 belong to us.

09:06:19 20 The documentary evidence in this case, and much of  
21 this -- and the testify you've heard, much of it from Fallon's  
22 own witnesses and their own documents, shows that Fallon has  
23 taken what did not belong to it. And that was iLight's  
24 patented inventions.

09:06:36 25 Fallon did so for the most basic of reasons. It made

1 a lot of money. Money was at risk, and Fallon just marched  
2 ahead. And it continues to do the same thing to the present  
3 and for the same reason. That is not right, ladies and  
4 gentlemen. And that is why iLight has come to court, in order  
5 to get help in stopping iLight (sic) from committing further  
6 acts of infringement.

09:07:01 7 In my opening statement to you, I outlined what I  
8 thought the facts in this case would show. And we believe the  
9 evidence that has been presented to you so far, from the  
10 testimony of the witnesses you have heard live, from the  
11 witnesses you saw on the video, and from the documents we have  
12 put into evidence, established the following. And I am going  
13 to refer to some notes, because there is so much that we have  
14 tried to digest in this case, so I beg your indulgence if I do  
15 look down at my notes. But I don't want to miss all the  
16 points I want to make.

09:07:31 17 we believe the evidence in this case has established  
18 infringement by Fallon, clear infringement. Fallon has  
19 infringed the claims of each of the three iLight  
20 patents-in-suit by its sale of LED Open signs -- we'll refer  
21 to those in a minute -- to Sam's Club, and by its sales of the  
22 Budweiser sign -- you saw the Budweiser Bowtie signs -- to  
23 Anheuser-Busch. That infringement by iLight (sic) was by no  
24 means accidental. In our view it was callous, it was willful  
25 and deliberate.



09:08:06 1           Also, we had testimony from both sides, damages  
2 experts. It's quite clear that iLight in this case has been  
3 greatly damaged by Fallon's sales of over \$35 million of  
4 infringing LED signs from 2005 to the present. An award to  
5 iLight of \$2.5 million, which is what our damages expert said  
6 was appropriate, we believe is appropriate, and the evidence  
7 established that.

09:08:33 8           Fallon's suggestion that, oh, \$30,000 or so would be  
9 sufficient, frankly, we don't think passes the straight face  
10 test. iLight's patents were properly granted. Fallon has not  
11 established, by what the Court will tell you is the clear and  
12 convincing evidence standard. That's a high burden that each  
13 of the asserted claims of the iLight patents are invalid.

09:08:58 14           The evidence confirms that the experts in the United  
15 States Patent Office, who the government has appointed to make  
16 the determination about patentability, did their job properly  
17 when they examined the iLight application for patent not once,  
18 not twice, but three times.

09:09:16 19           would you please put up the timeline. Now, we  
20 prepared a very summary timeline which does show some of the  
21 events that have occurred in this case. And I will discuss  
22 them a little bit. But just starting off in the very  
23 beginning, you heard the testimony from Mark Cleaver, the  
24 Chairman of the board of iLight that has been with us through  
25 this trial, and about how he and George Hulse, who live right

1 here in Cookeville, started to develop a company back in April  
2 of 2000.

09:09:56 3 And then the events continued. You will see how, I  
4 think -- I will go through these in detail, but I want to put  
5 the timeline up to focus our attention on what happened  
6 between the years 2000 and 2007.

09:10:10 7 You will recall that Mark told you -- Mark Cleaver,  
8 when he testified -- that he and George decided to give up  
9 their pretty safe day jobs and take a risk and start a new  
10 company right here in Cookeville. If they were, of course,  
11 somewhat unscrupulous, they could have decided, well, why  
12 don't we just copy somebody else's product? Maybe go to Asia  
13 and have it made cheaply and bring it over here and sell it  
14 and undercut possibly whoever is selling that product here.

15 Instead, they set their sights higher. They wanted to  
16 try to develop something different, that proverbial better  
17 mousetrap. They wanted to try to develop new technology for  
18 the lighting industry. The thought was to build a business  
19 based on cleaner, safer, more energy efficient, and  
20 environmentally friendly lighting products as a replacement  
21 for the neon lamps that have been used in signage that you  
22 have seen.

09:11:07 23 And the problems associated with neon. You have heard  
24 what those problems are. Neon is thin glass tubes. I'm sure  
25 you've seen these at home with fluorescent tubes, very

1 similar. But they break easily, the signs break, you have  
2 glass all over the place, and then you release -- the ones  
3 that hold mercury -- mercury vapor into the environment.

09:11:31 4 George and Mark, and eventually their colleague from  
5 college, Eric Eriksson, worked hard from 2000, April of 2000,  
6 all the way through to the end of that year and into the next  
7 year. And along the way, they met a lot of problems. You  
8 heard about this. This wasn't easy. This wasn't  
9 straightforward. Because now we're talking basically nine  
10 years ago. And at that time everything wasn't obvious, as  
11 some of the witnesses said it is today.

09:11:57 12 Of course, once you see the solution -- and the  
13 solution is set forth in the iLight patents -- once you see a  
14 solution to the problems, then everything is obvious.

09:12:07 15 But the key is to try to put your heads back to the  
16 early part of this decade, the year 2000. And the tests that  
17 you will get to on validity, on the obviousness, was, would it  
18 have been obvious at that time for somebody with ordinary  
19 skill in the art, who hadn't seen iLight's solution, to make  
20 the invention claimed in each of iLight's claims of its  
21 patents.

09:12:31 22 And that's why the experts in the Patent Office are  
23 particularly adept at making this call. That's what they do  
24 day after day. And that's the test they use, and that's the  
25 test the Court will tell you to use in its closing

1 instructions.

09:12:45 2 Now, this was not easy, it was not straightforward.  
3 You heard about a lot of the problems and frustrations that  
4 these inventors suffered along the way. But after a while,  
5 they came up with a solution. And Mark described how that  
6 happened at the end or close to the end of January 2001.

09:13:05 7 And he also showed you some of the signs that  
8 ultimately resulted from their new concept, their new  
9 approach, to lighting. Those signs, we've seen them, some of  
10 them are quite beautiful. I think you will remember the Camel  
11 sign we showed you and all that. And they are marked. They  
12 will be with you in the jury room. Those are Trial Exhibits  
09:13:28 13 6 A through 6 E. Those are the iLight signs.

09:13:32 14 Mark described the advantages that met his criteria  
15 for the new product. He felt by the end of January of 2001  
16 they had achieved their goal and come up with something that  
17 they thought was quite important.

09:13:48 18 iLight's technology, its new LED technology to replace  
19 neon lamps, was eventually accepted with open arms by some of  
20 the bigger customers of signage, and that includes both Sam's  
21 Club and Anheuser-Busch. These customers began to switch from  
22 the traditional neon signs like the companies such as Fallon  
23 had to sell, to these newer -- the new generation of LED signs  
24 that iLight and its strategic partners were selling.

09:14:15 25 Now, Mark told you that the inventors realized that

1 after this long road they went down that they thought they had  
2 come up with something quite important. To protect their  
3 money, time and their effort, they talked to a patent  
4 attorney, prepared a patent application, and filed that with  
5 the Patent Office.

09:14:31 6 The Patent Office, after examining it quite carefully,  
7 you heard a lot about this experienced examiner called Mr.  
8 Sember. He examined all of the iLight applications, and he  
9 also examined the application of Mr. Slayden, for Mr.  
10 Slayden's patent. But after his examination, after the back  
11 and forth with the iLight attorneys, the discussions about Mr.  
12 Slayden's patent and the differences between iLight's  
13 invention and that patent, the Patent Office became satisfied  
14 that the iLight application was in proper condition and met  
15 all of the requirements for patentability.

09:15:09 16 And those requirements included the claims had to be  
17 clear and definite, they had to be valid over the prior art,  
18 and that prior art was particularly Mr. Slayden's patent and  
19 the other patents that the examiner considered, but they  
20 certainly were not obvious or anticipated by Mr. Slayden's  
21 patent, the hollow tube patent, at least in the examiner's  
22 eyes.

09:15:39 23 If you will, can you put up Trial Exhibit 1.

09:15:43 24 Now, this is -- in your juror books, you have a copy  
25 of each of the iLight patents. This is the '238 Patent. This

1 is the first page. And while that page is pretty, it's also  
2 pretty important.

09:16:01 3 Can you bring up the first paragraph there. Right  
4 above United States Patent. That's correct.

09:16:10 5 Now, this is what they call the patent grant. And  
6 this is signed by the head of the Patent Office, the  
7 Commissioner of Patents, whom I will call the Director. When,  
8 only when, all of the requirements of patentability have been  
9 met, will an applicant have his patent issued and be given  
10 this grant. It's an acknowledgement that the Patent Office  
11 has received an application for a patent for a new and useful  
12 invention.

09:16:37 13 The title and description of the invention are  
14 enclosed. So you will see attached to this grant there is a  
15 patent.

09:16:44 16 The requirements of law have been complied with, and  
17 it has been determined that a patent on the invention shall be  
18 granted under the law.

09:16:52 19 It was very serious, this examination was complete,  
20 and the Patent Office believed the claims in the patent are  
21 proper and it should be issued. And again, these are  
22 officials that have no stake in this battle. They are totally  
23 independent, sitting up in Washington doing their job.  
24 Eventually, the Patent Office issued two additional patents  
25 for Mark and his colleagues' invention. Those are Trial

1 Exhibits 2 and 3 in your folders.

09:17:25 2 The rights granted to iLight are difficult sometimes  
3 to explain to people. But it's the right to exclude others  
4 from making, or selling, or importing into this country what  
5 is covered by the claims of the patent. That's the basic  
6 right of the patent.

09:17:42 7 Now, infringement. What is infringement? Basically,  
8 infringement is the unlawful taking, in this case, of iLight's  
9 patent rights. Those are the exclusive rights the government  
10 has granted.

09:17:55 11 Fallon ignored the exclusive rights granted to iLight  
12 by importing from its Chinese suppliers and selling its LED  
13 signs to major companies in the United States, even after  
14 iLight notified Fallon in 2005 of the issuance of its patent.  
15 This was illegal, and this is called patent infringement.

09:18:18 16 So you are probable asking yourself, why would Fallon  
17 do this? It was always selling neon signs. It could just  
18 continue to sell it. You've heard that the company is still  
19 those signs today.

09:18:28 20 We suggest that the internal documents from Fallon  
21 tell that story. There is the story told of desperation and,  
22 frankly, greed. In 2003, Fallon was shocked to learn that  
23 Sam's Club -- from Sam's Club, the buyer at Sam's Club, that  
24 Fallon's neon sign business was at risk. Rather than develop  
25 better neon signs, or maybe a new product, Fallon decided to

1 cut corners and simply had its Chinese supplier build  
2 neon-simulating LED signs that used the invention claimed in  
3 the iLight patents.

09:19:03 4 Indeed, Tim Fallon -- I think you remember the video  
5 of Tim Fallon -- assured the Sam's Club buyer at that time  
6 that Fallon would provide neon-simulating LED signs that would  
7 look like the iLight sign that Sam's Club was already  
8 purchasing in 2003 from iLight and its partner, Identity  
9 Group, an outfit right here in Cookeville.

09:19:26 10 By taking iLight's -- by using this shortcut and  
11 taking iLight's patent, iLight's solution that iLight had  
12 found to the problems with neon lamps, Fallon was able to  
13 displace iLight at Sam's Club and at Anheuser-Busch and has  
14 been able to sell over \$35 million to date of these what we  
15 believe are infringing neon-simulating LED signs.

09:19:53 16 Now, on the issue of infringement, iLight only needs  
17 to establish proof of infringement by what the Judge will tell  
18 you is a preponderance of the evidence. And that means the  
19 scales tip slightly, however slightly, in iLight's favor. We  
20 think the evidence presented to you in this case shows that  
21 the scales tip even more heavily in iLight's favor. That's  
22 the burden that iLight has to establish for infringement.

09:20:23 23 I would like to go through a few exhibits that Dr.  
24 Roberts discussed with you on the issue of infringement.

09:20:30 25 I'm not going to cover the whole case. I think you will



1 breathe a sigh of relief about that. But Dr. Roberts' report  
2 will be back with you in the jury room. The complete details  
3 of his analysis are set forth in his report, which is Trial  
4 Exhibit 29. So if you have any questions, feel free to refer  
5 to that report to get more detail on what I have covered.

09:20:52 6 Dr. Roberts carefully analyzed four signs of Fallon.  
7 And we've seen those here today. Initially there is a Fallon  
8 Open sign for Sam's Club that's exhibit -- I believe it's 11,  
9 John, is that right? Yes. Exhibit 11. This was the first  
10 LED sign that -- or sign type that Fallon supplied to Sam's  
11 Club after knowing about iLight's LED sign.

09:21:27 12 Then there is the follow on sign, what's called the  
13 Super Bright Open sign of Fallon that was supplied to Sam's  
14 club, and that was Trial Exhibit 13. And I believe these  
15 signs will also be back with you in the jury room, if you want  
16 to look at them then.

09:21:43 17 Then there was the original Budweiser Bowtie sign.  
18 That's Trial Exhibit 12. And the newer Budweiser Bowtie sign,  
19 and that's Trial Exhibit 14. And you will see the newer one  
20 has the -- the Bowtie is outlined in this red rod-like wave  
21 cut. That's the difference between the newer and old one.

22 Now, Dr. Roberts carefully analyzed each of these  
23 signs in the work he did to see whether or not they were  
24 covered by the claims of the iLight patent. He put his  
25 analysis on each of these signs into the form of what we call

1 a claim chart. I will discuss one of those with you in a  
2 moment. But just for your information, this is his detailed  
3 analysis and summary form for each of these signs.

09:22:41 4 The claim charts -- I will give you the exhibit  
5 numbers in case you want to refer to them in the jury room --  
6 for the original Xenon or Fallon Open sign for Sam's Club is  
7 Trial Exhibit 29 LL.

09:22:58 8 The claim chart for what's called Super Bright Open  
9 sign, the bigger one, is Trial Exhibit 31 T as in Tom. The  
10 claim which shows infringement for the original Bud Bowtie  
11 sign is Trial Exhibit 29 QQQ. Triple Q. And finally, the  
12 claim chart that shows infringement for the newer Fallon Bud  
13 Bowtie sign is Trial Exhibit 31 S as in Sam.

09:23:34 14 These claim charts are basically the summaries of Dr.  
15 Roberts' more detailed opinions that are in his expert report,  
16 which will be back there with you, Trial Exhibit 29. And I  
17 believe they should be helpful to you if you need to refer to  
18 them on the issue of infringement.

09:23:53 19 Remember, if you determine that Fallon has infringed  
20 only one claim of one of the iLight patents, Fallon has  
21 committed patent infringement. In other words, we don't have  
22 to establish that Fallon infringed every claim; one claim is  
23 sufficient.

09:24:09 24 I'd like to give you now a very brief summary, a top  
25 level summary, of the claims we believe Fallon has infringed

1 in each of the patents.

09:24:18 2 In the '238 Patent, we believe Claims 8 and 25 have  
3 been infringed by the Fallon original and newer or Super  
4 Bright Open signs sold to Sam's Club.

09:24:32 5 We also believe that the original Budweiser Bowtie  
6 sign has been infringed by those same claims, 8 and 25, of the  
7 '238 patent.

09:24:43 8 And finally the revised, the newer, red, if you will,  
9 Budweiser Bowtie sign we believe has been infringed by Claim 8  
10 of the '238 patent. Now, that's the only claim -- very  
11 candidly, that's the only claim that Dr. Roberts found was  
12 infringed by the newer Budweiser Bowtie sign. So that's the  
13 only one you have to look at, Claim 8 of the '238 on the newer  
14 Budweiser sign. We haven't accused it of infringing other  
15 claims in the other patents.

09:25:12 16 Now, with respect to the '262 patent, that's the  
17 second iLight patent, this one will be easy, Claims 1 and 8 in  
18 our view have been infringed by the original Fallon Open sign,  
19 and the newer or Super Bright Fallon Open sign for Sam's Club,  
20 and by the original Budweiser sign. Again, that's Claims 1  
21 and 8 of the '262 Patent.

09:25:37 22 And finally, on the '970 Patent, Claims 1 and 5 have  
23 been infringed by the original Fallon Open sign, the Super  
24 Bright, the newer Fallon Open sign for Sam's Club, and the  
25 original Budweiser sign.

09:25:53 1 In addition, Claim 8 of the '970 Patent has been  
2 infringed by Fallon's sales of the original Open sign and the  
3 original Budweiser sign.

09:26:07 4 Now, I would like to look at the claim chart, just so  
5 you know what that is, for one of the signs for the first  
6 claim of the '238 Patent, and look at some of the slides used  
7 by Dr. Roberts and others to explain Fallon's infringement to  
8 you.

09:26:24 9 Could you put up Trial Exhibit LL, please.

09:26:28 10 Now, this is what you will find back with the exhibits  
11 in the jury room. It will be a lot easier to read there. But  
12 this is a claim chart. Could you just page through this maybe  
13 a couple of sheets.

09:26:39 14 What you are seeing here are the claims of the patents  
15 broken out by claim element.

09:26:42 16 Then stop there for a second.

09:26:46 17 That's on the left-hand column. That's each of the  
18 claims and its various claim element. And on the right-hand  
19 side is the explanation of where that claim is found in the  
20 Fallon infringing products. So that is kind of a guide for  
21 you to show the analysis Dr. Roberts did and how he concluded  
22 claims elements were present, or yes, and the reasons behind  
23 it.

09:27:16 24 If you could go back to the first page of that  
25 exhibit. The exhibit is 29 LL. And expand the first couple

1 of boxes, please.

09:27:31 2 Just to give you an example, the Claim 8 of the '238  
3 Patent starts with an illumination device for simulating neon  
4 lighting. And that's in every one of the claims. That's what  
5 this is all about. That's what the invention is all about.

6 So across from there is the explanation, yes, Dr.  
7 Roberts found that was in the Fallon sign, and he explains  
8 why, indeed, Fallon has pretty much admitted that. That's on  
9 their advertising. This is the -- their LED signs have  
10 replaced the traditional neon signs.

09:28:04 11 Stepping down to the claim, a substantially rod-like  
12 member, the Court has told you and will tell you again what  
13 that means. But basically rod-like means a slender bar like a  
14 rod. And a rod, the Court will tell you, is a slender strip  
15 or a slender bar resembling in shape a wand.

09:28:28 16 And you will see, and we'll discuss this in a bit, but  
17 the letters and accents on the signs at the top, the waveguide  
18 at the top, are slender strips of plastic that certainly  
19 resemble a wand, if you will, when assembled as part of the  
20 illumination device.

09:28:47 21 Now, I think you will recall that Fallon's attorney  
22 picked up one of these top pieces and was just waving it  
23 around, saying, is that a wand, or whatever.

09:28:56 24 But the whole idea is, this invention is to an  
25 illumination device, not an individual piece. So when

1 assembled in the illumination device as claimed, these do  
2 resemble -- an example at the end here -- a rod or a round  
3 piece. And the reason for that is they are replacing neon --  
4 small neon lamps that have the same shape that look like a  
5 long wand, if you will.

09:29:26 6 So that claim element is found, and that's there.

09:29:27 7 And then there are additional -- I'm going to skip over a  
8 couple -- there are additional claim recitations. I think you  
9 can look at those. And frankly, Dr. Roberts went over this in  
10 great detail, so I'm not going to do this in tremendous  
11 detail.

09:29:46 12 But I would like to talk for a second about the  
13 interior light reflecting surface, I'll show you on the next  
14 page. Let's go to the next page, please. Yes. And if you  
15 can expand, each with an interior light reflecting surface.

09:30:27 16 Now, this is the spot where Mr. Hathaway, Fallon's  
17 expert, and Dr. Roberts disagree. Dr. Roberts found that the  
18 inside of the sidewalls in the Fallon signs reflect a  
19 significant amount of light up into these milky white letters  
20 or waveguides at the top. And his experiments showed that if  
21 you remove these inside sidewalls, it reduces the amount of  
22 light quite dramatically. And frankly, that proves, from a  
23 scientific level, that indeed these interior sidewalls are  
24 reflecting light.

09:31:09 25 Now, Mr. Hathaway is trying to say that, well, they

1 don't. And that was just about it. He says because they are  
2 dark. But indeed, those interior sidewalls are very, very  
3 polished. You can take the sign apart, look at it, some of  
4 the pieces come off. You will see how highly polished those  
5 walls are to serve as a reflecting surface.

09:31:35 6 Can you pull up Exhibit 588. Let's look at the first  
7 page for a second.

09:31:59 8 Now, this Exhibit 588 are photographs of the Fallon  
9 Xenon original Open sign. And you will see the exhibit  
10 includes eight photographs, and that's just a summary page on  
11 the front. And would you go to photograph 8. Which I believe  
12 is the last one in the exhibit. Okay. Maybe rotate it. Now,  
13 it's a little -- Your Honor, I wonder if we can for a moment  
14 dim the light a little bit so this will show up. Thank you.  
15 That's very helpful.

09:32:52 16 Now, if you look on these photographs, which are  
17 actual photographs of the Fallon what we believe is infringing  
18 device, you will see what looks like a row of LEDs here and  
19 reflections on the inside. There is certainly no question  
20 that, when these signs are illuminated, those walls are very,  
21 very shiny and highly reflective. It looks like there is a  
22 bunch of rows of LEDs in here.

09:33:27 23 And indeed, John, if you can illuminate the Fallon  
24 original sign. I think if you can bring it a little closer to  
25 the jury, you can see it with your own eyes, and you can do

1 this back in the jury room, that those sidewalls are  
2 reflecting -- very reflective. And you will see what looks  
3 like multiple rows of LEDs in this. Thank you.

09:33:58 4 So to assert that the sidewalls are not reflective,  
5 the inside sidewalls, as the claim calls for, we think it just  
6 doesn't make sense. And basically, that's one of Fallon's  
7 don't believe your own eyes defense. We just don't think that  
8 holds water at all.

09:34:19 9 Then another is the exterior light absorbing surfaces.  
10 You have seen these matted outside surfaces that were talked  
11 about quite a bit. That is to absorb light. So that part of  
12 the sign doesn't stand out. What you really I want when these  
13 are lit up is for people to see the lighted part and not the  
14 other part of the sign that stands up and makes it leap out at  
15 you. So we think that part of the claim, Claim 8, of the '238  
16 Patent, certainly is infringed. Or is present, I'll put it  
17 that way, in the Fallon signs.

09:34:55 18 I think, Your Honor, if we could put the light back on  
19 now.

09:34:58 20 THE COURT: All right.

09:35:01 21 MR. VEZEAU: Thank you. So that basically I had the  
22 claim chart up there, that takes you through Claim 8. Claim  
23 25 has very similar claim recitations. And I'm not going to  
24 take you through that, but that is in the claim chart. You  
25 step through it pretty much same way. So once you get past



1 the first claims and to the other claims, they are easier  
2 because you will see that there is reputation.

09:35:26 3 Some of the words in the claim are different, and you  
4 really do need to focus on that. For example, Claim 25  
5 doesn't talk about rod or rod-like, it talks about a light  
6 transmitting member.

09:35:39 7 Claim 1 for example, of the '262 Patent, which is one  
8 of the claims Fallon has infringed, talks about an essentially  
9 solid leaky waveguide rod. And the claims of the '970 Patent  
10 are each a little different, and the wording used is a little  
11 different.

09:35:56 12 For example, Claim 5 talks about an essentially solid  
13 leaky waveguide rod. That all gets important when you are  
14 considering the issue of Mr. Slayden's patent, which is the  
15 hollow tube patent. That certainly is not an essentially  
16 solid waveguide rod.

09:36:19 17 Now, again, to get back to this rod or rod-like and  
18 the distinctions Fallon's counsel was trying to make. You can  
19 tear a sign apart, hold up just about any little piece, and  
20 say, oh, that's not what the claim calls for, that's not what  
21 the device is, this is not sold as a bunch of little parts.  
22 This device was sold by Fallon to Sam's Club and to  
23 Anheuser-Busch on the Bowtie sign as a complete assemblage.  
24 It's an illumination device. It's fully assembled.

09:36:51 25 And when assembled, each of these ten strips on the

1 top, the slender strips, have the shape of a wand. And again,  
2 the reason for that is they are replacing these thin neon  
3 bulbs that were previously in here, so they must have this  
4 wand-like or rod shape, and that's why they are shaped in that  
5 manner.

09:37:18 6 Now, there was an issue raised by Fallon's expert  
7 about preferentially scattering light. You saw lot of  
8 scientific evidence from Dr. Roberts about that. He showed  
9 you photographs where the light on this top waveguide on the  
10 Fallon signs were stretched out. That's what preferentially  
11 scattering light means. The Court will define that in greater  
12 detail for you.

09:37:46 13 But that's the basic feature. And the whole idea for  
14 that was that's what gives you -- when you do that, that's  
15 what gives you this smooth, even glow on these letters, which  
16 is why people like neon signs. The neon sign has -- it  
17 doesn't looks like a bunch of little points, lights, it looks  
18 like a big lamp, stretched out, nice, soft and smooth. And by  
19 using this preferentially scattering light that's in some of  
20 the iLight claims, with the waveguide, with the waveguide  
21 technology, Fallon was able to achieve that neon simulation in  
22 its LED signs.

09:38:29 23 I'd like you to put up, if you will, Trial Exhibit  
09:38:34 24 29 BB, as in boy. I'm sorry. This is another photograph,  
25 Your Honor. I thought we were through with this, but maybe if

1 we can dim the light again.

09:38:45 2 This is one of the experiments that Dr. Roberts did.  
3 And it showed how, on the top here, when one bulb was lit, how  
4 you really had this preferentially scattering or this  
5 stretching of the light down the waveguide and ultimately  
6 around the sides, too. And that's what gives you that even  
7 glow.

09:39:08 8 He did that for each of the signs to show that this  
9 phenomenon, if you will, is present when these thin strips,  
10 like the waveguide strips at the top of the sign that covers  
11 the top of the channels in which the LEDs sit, when that's  
12 formed, if you will, as in this rod or wand-like shape,  
13 rounded at the top.

09:39:30 14 That, what we have up, this display, is Trial Exhibit  
15 29 BB, and that's boy-boy. And that's for the Xenon Open  
16 sign. The same thing was done for the original Budweiser  
17 Bowtie. And that's Trial Exhibit 29 HHH. The Super Bright  
18 Open sign, the later -- that's Trial Exhibit 31 I. And  
19 finally, the new Bowtie, the sign for Budweiser, that is Trial  
20 Exhibit 31 R.

09:40:06 21 And as I mentioned, Fallon's expert also took issue  
22 with the interior light reflecting surfaces, saying he didn't  
23 believe they were light reflecting surfaces. I think when you  
24 look at it, turn it on in the jury room, your own eyes are  
25 going to tell you something different.

09:40:31 1 If we could bring the light up again, please. Thank  
2 you.

09:40:36 3 Each of the features of each of the asserted claims of  
4 the iLight patents is present in the Fallon signs we put in  
5 front of you. We didn't overdo it. We didn't throw a lot of  
6 claims at you. We tried to pick and choose after Dr. Roberts'  
7 analysis. And I think we're very candid in telling you that  
8 the new Budweiser sign, that's one claim that I pointed out,  
9 didn't just say, oh, it's infringed by everything. We tried  
10 to be specific, and we tried to be accurate. We believe the  
11 evidence, on balance, the scales tip in iLight's favor with  
12 respect to the issue of infringement.

09:41:13 13 Now, another issue dealing with infringement is the  
14 concept of willfulness. Was this infringement by Fallon  
15 willful? And of course, now that Fallon is in court, you are  
16 going to hear oh, no, no, it wasn't willful, and you're going  
17 to hear a bunch of excuses. But candidly, we think Fallon's  
18 own documents and own people tell a different story. This was  
19 the story before they got into trial.

09:41:31 20 Fallon's infringement was not accidental. In fact, it  
21 was deliberate, willful, and in our view, in callous disregard  
22 of iLight's patent rights.

09:41:43 23 From any objective perspective, we think Fallon's  
24 conduct in this case was reckless. Fallon decided it was  
25 going to do whatever it took to save its business with Sam's

1 Club and to get business with Bud Anheuser-Busch, even if it  
2 meant ignoring iLight's patents.

09:42:09 3 Could you put up Trial Exhibit 19, please.

09:42:11 4 This is an e-mail from Tim Fallon. You heard from  
5 him. And it's from December of 2003. This is Trial Exhibit  
6 19. And he tells the buyer at Sam's Club, Ms. Van Roo, that,  
7 in developing our alternate technology over the past three  
8 months, we looked at a couple of iLight products.

09:42:41 9 No question they had iLight products in 2003, long  
10 before they had a product. And up to that time, they hadn't  
11 even though about LED, they were just selling neon technology.  
12 This was something new to them. And it was new because they  
13 now have got the sense that Sam's Club was going to get rid of  
14 neon signs, was going to bring in iLight's new LED technology,  
15 signage technology.

09:43:09 16 And he said -- he goes on, and you can read the e-mail  
17 again, we have put it in front of you a couple of times. But  
18 he goes on to say, this new product --

09:43:17 19 will you expand the bottom a little bit, starting with  
20 this new product? Right where you were, a little more in the  
21 sentence. Go back, please. Go back to the prior slide.  
22 Highlight the sentence, the fourth line there. This new  
23 product. Starting with this new product. The end of that  
24 line, the next line. All right.

09:44:08 25 And so here's Tim Fallon in 2003 assuring a Sam's Club

1 buyer that this new product, meaning the Fallon product, would  
2 look similar to iLight's Newon. That was the joint venture  
3 product with the Cookeville company here that iLight had been  
4 selling to Sam's Club.

09:44:33 5 And you also heard, oh, how easy it would be, it would  
6 be obvious for anybody to do this, and this, and no problem  
7 whatsoever. Well, frankly, this was December of 2003. It  
8 wasn't until January of 2005 that Fallon was finally able to  
9 deliver a product to Sam's Club. It took them that long. So  
10 it wasn't an easy or straightforward job. It took even on  
11 their part, even after seeing iLight's patents, seeing their  
12 product, it still took time to develop this technology to a  
13 point, to get it into production so they could sell it.

14 Fallon's also interest -- in the last page of this  
15 exhibit, this is from our good friend, Mr. Fallon, again, in  
16 December of 2003 to Ms. Van Roo, the buyer at Sam's Club. And  
17 just so you know, this is part of what we believe is copying  
18 the invention in our products. Mr. Fallon's tone to Ms.

09:45:29 19 Van Roo, wanted to follow up. While we were testing iLight  
20 signs, we sent a couple of them to U.L.

09:45:38 21 That's Underwriters Laboratory in Chicago. They look  
22 at a lot of products and list them if they meet certain  
23 industry requirements.

09:45:46 24 We just heard back from them late yesterday afternoon  
25 coincidentally. They told us that the U.L. 48 standard for

1 electric signs is changing to include --

09:45:58 2 So now it's just changing to include.

09:46:02 3 -- LED signs like the one we sent in. As long as the  
4 adapter is U.L. listed, this sign is U.L. listed, too. So the  
5 Supreme Court -- Tim Fallon has got his hands now on some  
6 iLight signs, and they are going to use that, of course, and  
7 what they learn from that, in developing their own products.  
8 This is all on the issue of willfulness in their infringement.

09:46:29 9 Other trial exhibits also demonstrate Fallon's  
10 desperation. Can you put up, for example, Trial Exhibit 22.  
11 This, we talked about a little bit, was 12/20/05. And this  
12 was a letter from Mr. Huo. Now, Mr. Huo was the head of  
13 Fallon's Shanghai plant where they pumped out these signs and  
14 then shipped them into this country.

09:46:50 15 Now, Mr. Huo is telling his boss in this e-mail -- and  
16 his boss is the big boss at Fallon, Mr. Bagin, who didn't  
17 bother to come to here for trial. But he is telling him, we  
18 can always submit a patent application for the LED oval sign  
19 with broken borders, but I don't believe it will receive  
20 approval, and if iLight does get a whiff of our filing and  
21 files an objection, we are dead in the water.

09:47:17 22 And then he said at the bottom, iLight does have a  
23 patent filing for its LED product. Please see the attached.  
24 And he admitted in his deposition that that was the iLight  
25 patent that you have, the '238 Patent.

09:47:27 1           So there is no question that they had their hands on  
2 iLight's patent, they had their hands on iLight's product, and  
3 they just went merrily ahead because business was at stake,  
4 and after all, who was iLight? They never heard of them.  
5 Just a little upstart.

09:47:42 6           So, what happened next? Well, of course, iLight finds  
7 out from Sam's Club that, oh, we're maybe looking back at the  
8 Fallon because they said they can give us a sign that looks  
9 just like yours.

09:47:54 10          So rather than hauling off and filing a lawsuit,  
11 iLight said, well, let's be reasonable, let's write to the  
12 Fallon company and see if we can talk to some sense to them,  
13 tell them about our patents.

09:48:11 14          So can you pull up Trial Exhibit 8.

09:48:22 15          I won't go into this in great detail, but this is a  
16 letter from iLight's counsel to --

09:48:31 17          Can you pull up the heading.

09:48:36 18          -- To the president or legal department of Fallon. It  
19 wound up eventually with the president, Mr. Bagin. And  
20 basically, the letter says -- it's Trial Exhibit 8. You can  
21 read it if you want, but we've already read it to you several  
22 times. I'm not going to belabor the point. But basically  
23 it's saying, look, we've got some patents here, please pay  
24 attention.

09:48:53 25          Not much happened after that. There was a response



1 from Fallon's counsel. His lawyer wrote back.

09:49:08 2 Can you put up Trial Exhibit 26. Hold on. Trial  
3 Exhibit 40.

09:49:12 4 This is the response, very cryptic, short, to the  
5 point. You will see a little problem with it later. But This  
6 is one of Fallon's lawyers writing back saying, we don't  
7 infringe, so thank you very much.

09:49:26 8 That's what we -- that's what could be referred to  
9 very uncharitably as a blow-off letter. But indeed, there was  
10 a lot of concern at Fallon.

09:49:39 11 Can we put up Trial Exhibit 6. Oh, sorry. Stay for a  
12 second on this exhibit, I'm sorry.

09:49:45 13 Now, this is kind of interesting, because you're going  
14 to hear in this trial how, oh, these claims are so indefinite  
15 that nobody can understand them. Well, there's no word about  
16 that from Fallon's lawyer way back when before they got to  
17 trial. He understood it. And he said, no, we don't infringe.  
18 To make that conclusion, you've got to understand the claims.  
19 He could have said, we don't know what these patents are  
20 really saying. He didn't say that.

09:50:06 21 So that's just another excuse they came up with in  
22 this trial. We believe it doesn't hold water. And part of  
23 the evidence it doesn't hold water is Fallon's own attorney  
24 certainly could understand it before they got into lawsuit.  
25 Now, all of a sudden, they are very confused.

09:50:22 1 Now, could you pull up Trial Exhibit 6 -- 61, I'm  
2 sorry.

09:50:29 3 Now, this exhibit is from August of 2005, right when  
4 they are trying to keep the business, get the business, keep  
5 the business. In this case, it's with Anheuser-Busch, that's  
6 what AB is. This is Trial Exhibit 6.

09:50:45 7 We see this is from Mr. Demmond. He was in charge of  
8 sales at Fallon. He was the big guy in sales. And He is  
9 telling Tim Fallon that: The bottom line, Tim, we want AB's  
10 business -- that's Anheuser-Busch -- but it must be  
11 profitable. China and LED seems to be the only solution.

12 No question they were getting desperate. They wanted  
13 to maintain that business with Anheuser-Busch, so they had to  
14 go to China, get products made cheaply, and also they had to  
15 switch to LEDs. And why not switch, as they did, and come up  
16 with something, as they said they were going to do, that  
17 looked like iLight's products.

09:51:33 18 well, not hearing much, not being satisfied, --

09:51:37 19 Can you put up Trial Exhibit 8, please.

09:51:42 20 In December of 2005, iLight's attorney wrote back to  
21 Fallon's attorney, and this started to get a little more  
22 serious. Here he calls the attention of Fallon to not only  
23 the '238 Patent but some other patents, including the '262  
24 patent.

09:52:00 25 And he expressed iLight's grave concerns.

09:52:04 1 Do you see that in the first sentence of the second  
2 paragraph. The whole sentence, please.

09:52:17 3 Again, this is Trial Exhibit 8, where iLight's  
4 attorney tells Fallon's attorney:

09:52:20 5 Since writing that letter --

09:52:23 6 He's referring to his earlier letter in April.

09:52:25 7 -- We have had an opportunity to review your client's  
8 products in the marketplace and have grave concerns.

09:52:33 9 So he's kind of signaling there, look, yeah, maybe  
10 we're a young upstart, but you'd better take us seriously.

09:52:41 11 Now, interestingly enough, let's put up the response  
12 to this from Fallon's lawyers, Trial Exhibit 41.

09:52:54 13 So here's Fallon's lawyers writing back to iLight's  
14 lawyer saying:

09:52:58 15 We got your letter of December 25 --

09:53:00 16 And this is interesting.

09:53:05 17 -- and are in the process of evaluating the issue  
18 patents and published patent applications, the file wrappers  
19 and the art of record contained therein. We anticipate this  
20 review will be complete, et cetera, et cetera.

09:53:20 21 This is another, in our view, stalling letter. But  
22 it's kind of interesting, because if you recall in the prior  
23 letter, they just wrote back quickly and said, oh, we don't  
24 infringe, thank you very much. And now he seems to be saying,  
25 well, maybe now we'll read your patents and start studying

1       them. In other words, doing the homework.

09:53:34 2               So you have to question really how much of a study did  
3       they do back in April when they said, oh, thank you, we don't  
4       infringe. We don't think they did much at all.

09:53:47 5               You saw portions of Mr. Bagin's deposition. I don't  
6       know if you remember the gentleman, but he's the boss. He's  
7       the big guy at Fallon. And he pretty much admitted he  
8       couldn't be bothered by this matter. He said he got a letter  
9       from his counsel that said, no infringement, didn't know much  
10      about the letter, didn't know who reviewed it, whatever,  
11      didn't ask questions. He said he just put it in file and  
12      didn't inquire further. He said it wasn't that important to  
13      him. It just wasn't that important.

09:54:14 14              He didn't care to question. He had no comments. He  
15      didn't stop sales during this -- whatever investigation was  
16      done by his lawyers, he didn't stop sales of LED products.  
17      why? Because they were frightened, frightened, frightened of  
18      losing the business, and they were going to just keep selling.

19              So he got this letter, put it in his hip pocket, so  
20      some day if it got to trial, he could say, oh, well, we didn't  
21      think we infringed. Well, we don't think he cared at all,  
22      frankly, except he cared about those bottom line profits, and  
23      that was it.

09:54:47 24              Tim Fallon, who you saw, and Mr. Bagin, head of the  
25      company simply continued to run rough shod over iLight. This

1 was a small company. They probably never heard of them  
2 before. And money was at stake. So frankly, Fallon simply  
3 tossed caution to the wind and said, we've got to keep that  
4 business. That's what's important to the company.

09:55:08 5 The evidence, we think from Fallon's own documents,  
6 you saw the testimony, and it own actions, show that Fallon's  
7 infringement of the '238 and the '262 Patents, there was no  
8 question it was deliberate and, we think, willful.

09:55:24 9 Damages. I would like to talk a little bit about  
10 damages with you. Mr. Bratic came on. I know he was the  
11 first of the damages expert, he was our expert, and spent  
12 quite a bit of time with you explaining in detail what the  
13 base was for damages in his view, what the royalty rate should  
14 be as a result of this hypothetical negotiation, and told you  
15 what in his view should be awarded.

09:55:50 16 His entire report -- all the experts had reports in  
17 this case -- is in evidence and is Trial Exhibit 32, in case  
18 you want to know any of the details on damages. I'm sure  
19 there's much more detail there than you care to really learn,  
20 but it's there if you want to look at it.

09:56:06 21 I want to show you some of his slides. We'll go  
22 through them quickly. But just to bring you head back to his  
23 testimony and why we believe an appropriate award is called  
24 for in this case.

09:56:20 25 Could we put up, please, Exhibit 32 J. Now, this is

1 Trial Exhibit 32 J, and it's a pretty important exhibit  
2 because it's his summary. This is his bottom line.

09:56:30 3 And he gave his opinion that the damages in this case  
4 owed to iLight would be calculated by applying what he  
5 determined was a reasonable royalty rate to the infringing  
6 base, that's \$34.5 million of sales, sales of the infringing  
7 products by Fallon. And that calculation will result in  
09:56:55 8 \$2.5 million. And he believed that would be a total -- a  
9 reasonable royalty in this case.

09:57:01 10 Now, it's kind of important, I don't think you will  
11 find that Mr. Bratic got too greedy here or that iLight is  
12 trying to be too greedy. He explained to you, and we'll go  
13 through a couple of slides, how this represented one-half of  
14 the profit premium that Fallon was able to achieve by moving  
15 into the LED business. They already had a plant set up. They  
16 were selling neon signs. Still are selling neon signs today.

17 So it's not like they had to build a new building or  
18 hire new people or do this. This was the profit premium, what  
19 they were able to achieve, by selling these infringing LED  
20 signs. And that premium -- you will see the slides -- was  
21 anywhere from 14 to 15 percent.

09:57:46 22 So looking at that, Mr. Bratic concluded that, of  
23 course, he couldn't say that Fallon did nothing to get the  
24 business. They did have relationships. They were out there  
25 beating on doors. They undercut iLight's price. They did a

1 lot of stuff. And so he's saying, I don't think it would be  
2 fair to give iLight all of that, but half of it he thought was  
3 fair. And that's where he came up with the 7 percent, in  
4 addition to talking to industry experts and looking at other  
5 factors.

09:58:13 6 So could we show Trial Exhibit 32 G, please.

09:58:15 7 This is that so-called hypothetical negotiation. Kind  
8 of strange, because it never took place. So this would have  
9 taken place at the beginning of Fallon's infringement back in  
10 January of 2005 when they first sold their first LED  
11 infringing sign to -- Open sign to Sam's Club.

09:58:34 12 And in this hypothetical negotiation, there would have  
13 been a negotiator for iLight and a negotiator for Fallon who  
14 would look at the landscape and see if they could come up with  
15 a reasonable royalty for a license, assuming that the claims  
16 of the iLight patents were valid, and assuming that Fallon was  
17 infringing, and assuming that the parties were really  
18 interested in doing a deal to avoid litigation. So that's the  
19 whole construct of this hypothetical negotiation that both  
20 experts talked about.

09:59:10 21 Could we go to 32 Q.

09:59:14 22 Now, Mr. Bratic said, I didn't just pull a number out  
23 of the air. He did look at what he called and other witness  
24 called Georgia-Pacific factors. In fact, Mr. Bratic grouped  
25 them into various logical what he called buckets, the

1 licensing characteristics and other group of factors were  
2 under nature and use of the invention, et cetera. And pretty  
3 much both experts talked about these. The Fallon expert said,  
4 oh, they all weighed in Fallon's favor. And Mr. Bratic said  
5 many of these weighed in iLight's favor, which you could  
6 imagine, but not all of them.

09:59:50 7 But in weighing each of these, Mr. Bratic came up with  
8 the -- this was part of the basis for his conclusion that 7  
9 percent would be a reasonable royalty.

10:00:01 10 Could we do 32 R.

10:00:03 11 So, for example, he started breaking these buckets  
12 down and talked about this first series of factors, factors 1,  
13 2, 3, 7 and 12, which he listed under licensing  
14 characteristics. And each of these are discussed in greater  
15 detail in his report. If you need to turn to that, it's Trial  
16 Exhibit 32.

10:00:24 17 Could we put up Exhibit 32 U.

10:00:28 18 Now, as a sanity check or reality check, Mr. Bratic  
19 said he got in touch with Mr. Kallmes, who we described as an  
20 industry expert in the field of licensing. He was a prior  
21 licensing director at a company called Color Kinetics, CK, a  
22 member of the Licensing Executive Society, and he had over ten  
23 years of experience.

10:00:52 24 And he discussed with Mr. Kallmes, Mr. Kallmes's views  
25 and experience in the field. And Mr. Kallmes said that at



1 Color Kinetics, the royalty rate ranged from 5 percent to 25  
2 percent. And then later he narrowed the range to 5 to 9  
3 percent when negotiating agreements. And he said those were  
4 the typical rates, 5 to 9 percent, in his view, for LED  
5 lighting and lighting control technology.

10:01:18 6 And he said to the upper end of that range was the  
7 range that were typically looked at when you were dealing with  
8 competitive situations, which, indeed, was the situation here  
9 between iLight and Fallon at the time, in January of 2005,  
10 when this hypothetical negotiation would have taken place.

10:01:43 11 May we have Exhibit 32, please. All right. So this  
12 basically gives Mr. Bratic support for his determination of  
13 the 7 percent royalty rate. iLight had a license with Color  
14 Kinetics, so it was very familiar with that royalty range, 9  
15 percent for competitive products in this field, 5 percent for  
16 noncompetitive products.

10:02:13 17 Again, Mr. Bratic talked to Mr. Kallmes, got his  
18 experience, the range Mr. Kallmes believed was the appropriate  
19 was 5 to 9 percent. Again, the higher end of that range for  
20 competitive situations.

10:02:32 21 Mr. Bratic determined Fallon's profit premium was 14.3  
22 to 15.3 percent from the sales of the infringing products.  
23 And so he said basically in his view the negotiators would  
24 have said, well, Fallon can't walk away with nothing. We're  
25 not quarreling with that. But a fair distribution here, in

1 view of the contributions of iLight, iLight's technology,  
2 patented technology, would be a 7 percent royalty to iLight.

10:03:03 3 I believe that was U. The next one I think is 32 N.  
4 Pardon me? That is N? How about that. 32 Y, please.

10:03:37 5 This goes back -- again, this is something Mr. Bratic  
6 considered, that in around 2004 Sam's had stopped purchasing  
7 oval neon Open signs from Fallon. That was Fallon's mainstay.  
8 That was the heart and soul of its business with Sam's Club.  
9 While they tested the signs, the LED Open signs, that used  
10 iLight's technology.

10:04:01 11 Fallon develop its Xenon Open sign -- that was the  
12 first one of these infringing signs we looked at -- to avoid  
13 losing Sam's Club business. No question about that. Sam's  
14 Club later began selling those signs to Sam's Club beginning  
15 in 2005. Indeed, Fallon likely would have lost Sam's Club  
16 business without going to these LED Open signs. That seems  
17 pretty clear from the correspondence we've seen.

10:04:28 18 And by that time, when iLight now approached Sam's  
19 Club, Fallon had already obtained the business, and Sam's Club  
20 said, hey, we're getting basically the same thing from Fallon,  
21 and it's a lesser price -- I think you remember he discussed  
22 price differential -- and he said, so thank you very much, but  
23 we're already getting these from Fallon.

10:04:51 24 Can we have the next exhibit? I think it's 32 W.

10:04:56 25 Mr. Bratic listened to the views of the experts, and

1 particularly Dr. Roberts, and in talking with Mr. Cleaver, and  
2 determined that these iLight patents in his view were, indeed,  
3 a significant advance in this particular field. And There  
4 were quite a few benefits. I don't think anybody has really  
5 quarreled with the benefits that were present in iLight's  
6 patented technology and in its signs.

10:05:26 7 Can we have the next exhibit. I think it's 32 Y.

10:05:29 8 Now, why is this so important to Fallon? Well, you  
9 can see that now, beginning in 2005, but now the accused sales  
10 represent 42, almost 43 percent of Fallon's total sales. So  
11 where it had sold none before, iLight came on the scene, now  
12 using the LED approach to signs, that has turned out to be  
13 about 43 percent of their total sales.

10:05:58 14 The next exhibit, please. I believe it's AA.

10:06:04 15 The iLight products, this was another issue that was  
16 considered in connection with what would be reasonable, indeed  
17 well recognized in the industry, achieved Product of the Year  
18 award in 2003. Sales were growing dramatically. Of course,  
19 he started small, no question about it. But they were growing  
20 very well from September of 2004 through August 2006.

10:06:30 21 Anheuser-Busch became one of iLight's customers with  
22 iLight's teaching partner with custom made signs. I think you  
23 saw those -- the Budweiser signs, the Bowtie signs. They were  
24 a customer before Fallon came in and grabbed that business by  
25 its own infringing products.

10:06:50 1 Mr. Cleaver estimated that the gross profit margin  
2 iLight was achieving on Plexineon, which is what they call  
3 their technology, their patented technology, was 37 percent in  
4 2005 and 39 percent in 2006. Pretty good for a startup  
5 company.

10:07:11 6 May we have Exhibit BB.

10:07:16 7 So iLight's sales grew pretty rapidly in the  
8 beginning. And you can see in 2005 they are doing very well.  
9 And these are sales of its LED signs that have incorporated  
10 its patented technology. But then after that, once Fallon was  
11 able to get back in with its own sign that look like iLight  
12 signs, or so as they told Sam's Club, you can see those sales  
13 dropped off dramatically.

10:07:41 14 So there is no question this was a competitive  
15 situation. And there is no question that Fallon's infringing  
16 sales hurt iLight dramatically.

10:07:52 17 May we have Exhibit 32 EE.

10:07:55 18 This is their profit premium I told you about. This  
19 is 32EE. I think it's a pretty important slide because Fallon  
20 is going to say, oh, we are just barely making it. Well, the  
21 reason why they were, if they were, were barely making it was  
22 because they were riding on the back of iLight's invention.  
23 The profit premium from iLight's technology that they  
24 incorporated in their LED signs gave them, on the gross profit  
25 -- looking at it from gross profit side, over 15 percent, and

1 at the operating profit level, over 14 percent.

10:08:30 2 May I have Exhibit LL.

10:08:36 3 So this is Tim Demmond, head of sales, writing -- at  
4 Fallon, writing in December 2003, writing to -- this is Tim  
5 Demmond writing saying that:

10:08:47 6 Tom presented the Bud Light Prestige.

10:08:50 7 That's their version of the Bud Light sign, the LED  
8 sign.

10:08:55 9 Even though the unit was flickering, they like it.

10 They being Anheuser-Busch, the people there.

10:09:01 11 However, they are leaning towards Version 2.

12 Anheuser-Busch said they are going to order several thousand  
13 units of this product, and they absolutely need to have  
14 Version 2 in their hands next week. We either deliver or they  
15 buy from iLight. Our fate is in our hands.

10:09:21 16 So now say these folks weren't competitors? I don't  
17 think that's the case. I think their own documents before  
18 they got into litigation show that, indeed, this was a very  
19 competitive situation.

10:09:33 20 May I have Exhibit TT.

10:09:38 21 This was the slice, if you will, of the total sales  
22 that Mr. Bratic thought would be reasonable. Exhibit TT, I  
23 think, puts it into a visual perspective. In this case, as  
24 the Court will instruct you, iLight is only entitled to --  
25 regardless of the ethics involved or whatever, iLight is only

1 entitled under the law to a reasonable royalty. And I think  
2 this slide tends to put it in perspective. Seven percent is a  
3 small piece of these infringing sales and we believe is a  
4 reasonable royalty.

10:10:16 5 May I have Exhibit R-1.

10:10:19 6 Now, Fallon's expert got up and argued that the  
7 redesign of Fallon's signs, the newer ones we have looked at  
8 here were not infringing, but that's simply not the case.  
9 They are infringing. Where he came up with that, we don't  
10 know.

10:10:39 11 But according to Dr. Roberts and his testimony and  
12 what I went through with you, and you have the claims charts  
13 that are in the back -- those are the ones I mentioned --  
14 these new products do infringe the patents-in-suit. But that  
15 was the reason why Mr. Degen believed that the royalty rate  
16 should be less.

10:10:57 17 Should we go to -- is that 1 or 2? This is Trial  
18 Exhibit 32 R-2.

10:11:01 19 Now, Mr. Degen asserted that Fallon could have  
20 retooled to make its current noninfringing design in January  
21 of 2005. But Fallon indeed sued -- I'm sorry, iLight indeed  
22 sued Fallon way back in March of 2006. And even if you  
23 believe Mr. Degen that, wherever he got this information,  
24 these signs, the newer signs, don't infringe, it certainly  
25 took them over -- a couple of years to get to this point. So

1 to say it was an easy thing, they could have just simply  
2 redesigned, well, that's not the fact. There is no evidence  
3 that Fallon ever designed its products around the  
4 patents-in-suit.

10:11:47 5 If we could have Exhibit 32 R-3. Mr. Degen would have  
6 you believe that a reasonable royalty would be likely to cost  
7 a retooling to implement the current design, which would be  
8 \$30,000 to \$40,000. Indeed, where he came up with that, he  
9 says Fallon told him that. It took them over a year from when  
10 they told Sam's Club that they were going to give them a new  
11 product that looked like iLight, to really get there, that's  
12 not a \$30,000, \$40,000 investment. And even when they did  
13 that, they said it was going to be like iLight's products, and  
14 it was, it was infringing iLight's products, iLight's patents.

15 So they did not come up with a noninfringing design,  
16 the \$30,000 number, we don't really know where that came from,  
17 there was no evidence of that, just something that somebody at  
18 Fallon told Mr. Degen.

10:12:35 19 But indeed, at that time, at the time of the  
20 hypothetical negotiation, they weren't planning to do this,  
21 and their whole business was at stake. Their business with  
22 their two major customers, Sam's Club and Anheuser-Busch. So  
23 to say the reasonable royalties should only be \$30,000 to  
24 \$40,000 when their whole business was at stake is a little bit  
25 of a stretch. That's simply not reasonable.

10:13:04 1 And to think that iLight's hypothetical negotiator  
2 would have agreed, oh, you want to give us \$30,000 to \$40,000  
3 for a license, and then you are free to do what you want?  
4 Think about that. Is that reasonable? Certainly that  
5 wouldn't have been agreed to in January of 2005 when iLight's  
6 sales had been growing like mad, and they were at a high  
7 point. They wouldn't have said, oh, yeah, just come on in,  
8 and that's fine with us for \$30,000. Makes no sense  
9 whatsoever.

10:13:42 10 May we have 32 R-15.

10:13:48 11 There was some talk about this 25 percent rule. Mr.  
12 Bratic's view was there is no economic basis for it. He said  
13 it was widely criticized and arbitrary. And frankly, that was  
14 the start of -- Mr. Degen said that was the start of his  
15 analysis. But really, there is no basis. He said, oh, it's  
16 an industry-wide thing. Here we have just a dispute between  
17 the experts. Mr. Bratic said he did not agree with that, and  
18 frankly, he could find no economic basis for it. It's just a  
19 number pulled out of the air.

10:14:16 20 So in summary, the conclusion Mr. Bratic reached that  
21 a \$2.5 million award to iLight as a reasonable royalty for  
22 Fallon's sales, infringing sales, of over \$35 million we do  
23 believe is reasonable, and that's what we ask from you.

10:14:37 24 Now, I would like to spend my few remaining moments  
25 talking about some of the defenses that have been raised in



1 this case by Fallon's lawyers.

10:14:50 2 Basically, Fallon is going to argue to you and has  
3 argued to you that the Commissioner of Patents and the United  
4 States patent examiners didn't know what they were doing when  
5 they granted iLight a patent. Well, I guess in a patent  
6 infringement case, you would not expect to hear the infringer  
7 argue anything else. Of course they are going to argue that.

8 However, the evidence is clear that the Patent Office  
9 looked very carefully at the iLight patent application. Not  
10 once, not twice, but three times they had to examine it, each  
11 time before they granted a patent.

10:15:21 12 We know that Mr. Sember was a primary examiner. He's  
13 the guy that examined Mr. Slayden's patent also. Mr. Slayden  
14 had the hollow tube invention. And he found that -- and he  
15 brought that patent up to iLight's attention and said, well,  
16 let's be sure that there is a line between these two, so let's  
17 look at your claims and make sure they are patentable over  
18 Slayden's how-to patent. In other words, that they are not  
19 obvious, and they are not anticipated by Mr. Slayden's patent.  
20 That's the determination that the examiner at the Patent  
21 Office had to make. And he did. He did that each time he  
22 allowed a patent in this case, the three iLight patents.

10:16:00 23 He also had to determine, are these claims reasonably  
24 clear in this industry to those working in this industry, and  
25 definite. He could not issue the patent unless he makes that

1 determination. And indeed, each time he looked at that, he  
2 said, yes, these claims are pretty good. They are clear.  
3 They are definite in his view, or else he could not have  
4 issued these claims.

10:16:21 5 And you saw the confirmation by the Commissioner of  
6 Patents on the first page of each of those patents. You go  
7 back and look. The Commissioner said they met all the  
8 requirements of patentability. Some of those requirements,  
9 they cannot be obvious in view of the prior art at that time,  
10 they cannot be anticipated by the prior art, and the claims  
11 must be clear and definite.

10:16:44 12 You will hear that patents and the claims of the  
13 patent are presumed to be valid. And that's a presumption  
14 that applies to each claim. Each claim separately is presumed  
15 to be valid. You don't group them as a bundle. You have to  
16 look at each one.

10:17:00 17 And to prove that the claims are invalid in court,  
18 it's a very high burden called a clear and convincing  
19 evidence. It's different than infringement. Infringement,  
20 the scales just have to tip a little bit in iLight's favor  
21 with the evidence, and then the verdict -- then the evidence  
22 is in iLight's favor. Infringement is established.

10:17:22 23 But for these invalidity defenses, Fallon must  
24 establish by a clear and convincing evidence a greater burden  
25 that the claims are invalid. And why is that? Sounds maybe

1 at first blush, well, that doesn't sound fair. But it is  
2 fair. And the reason for that is, iLight has gone through the  
3 process. iLight has gone through the patent process. It did  
4 it three times. And having gone through that process, having  
5 put itself before the Patent Office and the independent  
6 experts there, that is why this heavy burden is imposed on  
7 Fallon, to prove in a court setting by a clear and convincing  
8 evidence that the claims of the patent, each claim is invalid.

10:18:03 9 Fallon's witness, Mr. Hathaway, basically asserted two  
10 grounds for invalidity. He said first that the patents are  
11 anticipated by Mr. Slayden's hollow tube patent. And  
12 secondly, he said, oh, well, maybe if the hollow tube patent  
13 of Mr. Slayden doesn't have everything that's in the iLight  
14 claims, well, then it would have been obvious. iLight's  
15 invention would have been obvious.

10:18:27 16 Let's talk about anticipation first. For Fallon to  
17 succeed on that defense, again, it's got this high burden of  
18 clear and convincing evidence, but it has to show that all of  
19 the elements of that claim were disclosed in a single prior  
20 patent.

10:18:43 21 In this case, Fallon has focused on Mr. Slayden's  
22 hollow tube patent. But that patent doesn't show all of the  
23 element of iLight's -- claims of iLight's patents.

10:18:57 24 May I have the Slayden patent of Trial Exhibit 77,  
25 maybe the first page.

10:19:04 1 Now, this is his patent. And again, you will note --  
2 can we pull up on the left column at the bottom, primary  
3 examiner. At the bottom you will see Mr. Sember. You will  
4 see him on the first page of all of the iLight patents. Mr.  
5 Sember was the senior examiner there, what's called the  
6 primary examiner. So there is no question, he was responsible  
7 for the Slayden patent being issued. He had to examine that  
8 application.

10:19:34 9 He knew this patent. This wasn't something he just  
10 forgot about, as Fallon will try and stress with you. This is  
11 something he knew, he examined, and then he examined the  
12 iLight patents. And indeed, he was the guy that called this  
13 patent to iLight's attention and said, now, let's look at this  
14 and make sure your claims, what you are claiming to be your  
15 invention, is different, is not anticipated by Mr. Slayden's  
16 patent and is not obvious in view of it.

10:20:05 17 Now, if we can go down and expand on the hollow tube.  
18 By now, you probably know more about this thing than I  
19 do, so I'm not going to overdo this. But this is the hollow  
20 tube. This is just a base, if you will, or a housing to hold  
21 the hollow tube.

10:20:23 22 Importantly, I will talk about this, but the sides of  
23 these housings don't reflect -- are not relied on at all --  
24 there is not a word in Mr. Slayden's patent about those sides  
25 doing any reflecting of light, because the LEDs are mounted

1 right below this hollow tube and shine the light directly up  
2 into the hollow tube.

10:20:44 3 And Mr. Slayden's consideration was to use this long  
4 hollow tube. And that's what his whole patent is about. And  
5 You can read it. But that's what he talks about in his  
6 patent. He says, now, in my tube, I get this whole big round  
7 tube to glow by having light bounce around all over in the  
8 hollow. In the inside of this hollow tube. That's why he  
9 needs a tube.

10:21:04 10 And he says that it reflects all around in there, it  
11 bounces around, it refracts in there, goes inside, up through  
12 here and out through there. And that's how he gets what he  
13 believes is a nice glow on his tube.

10:21:19 14 It's quite different than what you will see in the  
15 claims of the iLight patent. And it's quite different in the  
16 examiner's mind, because what he did, since he was working on  
17 these applications way back in the early part of this decade,  
18 he is trained and the examiners are trained to do what you  
19 must do. Put your head, if you can, back in January of 2001.  
20 That is the time of the invention. And on the question of  
21 obviousness, ask yourself, at that time, without knowing  
22 iLight's solution, would it have been obvious to somebody  
23 skilled in the art to come up with the claims as a whole,  
24 everything in the claim, the entire combination of each claim  
25 of iLight's patent? That's what the examiner -- sounds tough,

1 but that's their job, and that's what they are trained to do.

2 Now, that analysis was not done in this case. The  
3 questions you probably heard from the stand were, would it be  
4 obvious for somebody to do that? well, today, of course. You  
5 know the solution. Once you know the solution to a problem,  
6 well, the solution is obvious because you see it. It's like  
7 any puzzle that you solve. All of a sudden, once you solve  
8 it, yeah, it's pretty easy. But going back from January 2001  
9 and back in 2000 when the inventor started, it wasn't that  
10 obvious.

10:22:33 11 And it wouldn't be obvious to substitute something for  
12 this hollow tube. The suggestion was made, well, I can just  
13 take a hollow rod or something like that from somebody else's  
14 patent and put it in Slayden's patent, and then voila, we've  
15 got what iLight invented.

10:22:51 16 That's not the case. why? The whole patent and the  
17 whole contribution by Mr. Slayden was the effect he got out of  
18 using this hollow tube and its tiny brother, or what he called  
19 the slotted hollow tube, which he said didn't even work as  
20 good as this. That had problems. It was not a good lighting  
21 device.

10:23:14 22 So, to argue that to throw away Mr. Slayden's  
23 contribution, this hollow tube, and just throw something else  
24 in there makes no sense at all, because that's what this  
25 Slayden patent, the hollow tube patent, is all about. So it

1 would not have been obvious if you look back in January 2001  
2 for somebody to do it, because this was his whole invention.

3 And that is exactly what the Patent Office concluded,  
4 that it would not have been obvious, to substitute somebody  
5 else's -- something from some other patent into Mr. Slayden's  
6 patent to invalidate, if you will, the claims of the iLight  
7 patents.

10:23:53 8 If the examiner thought that would have been obvious,  
9 he could not issue the patents, and he came to a different  
10 conclusion. If the examiner thought that all of the features  
11 in the iLight patents were present in Slayden's patent, the  
12 hollow tube patent, he could not have issued the patent. And  
13 he came up with a different conclusion.

10:24:11 14 You know, the claims in the iLight patent, you have to  
15 go and you have to read them, because that's what the examiner  
16 did. They called for not a hollow tube. They used different  
17 terms in each of the claims. Some are the same; some are  
18 different. But they call for a substantially rod-like member.  
19 Some of the claims call for an essentially solid leaky  
20 waveguide. That's not this hollow tube.

10:24:35 21 And the Court will define for you a rod -- already  
22 has. It's a slender strip or a slender bar resembling in  
23 shape a wand. We have seen that in the Fallon devices. It's  
24 kind of a stretch to say that those claim elements are this  
25 hollow tube of Mr. Slayden.

10:25:01 1 Now, Another reason why the claims are not  
2 anticipated, anticipated means everything has got to be -- in  
3 the iLight claims has to be in Mr. Slayden's patent alone.  
4 well, the other thing in the iLight's patents, or one of the  
5 other things that there was a lot of focus on were the  
6 internal reflecting sidewalls. we have showed you how Fallon  
7 uses those in its signs. That's in the iLight patents. It's  
8 in each claim.

10:25:29 9 And what iLight does is put its LEDs in the bottom of  
10 a big channel. And then at the top is the waveguide that  
11 iLight talks about. And iLight relies on light bouncing off  
12 the sidewalls and then entering the top to increase the light  
13 from the LEDs or increase the amount being received by the top  
14 piece. And that's how iLight achieved its glow, its constant  
15 glow that would simulate neon lighting.

10:25:58 16 That is not in the Slayden patent at all. Slayden  
17 mounts his LEDs right below his hollow tube. And not a word,  
18 not a word, in his patent about using sidewalls there that  
19 just hold the tube up to try to get reflections. The only  
20 reflections he talks about that occur in this device are  
21 reflections from light bouncing around inside his hollow tube.  
10:26:20 22 It's a very different approach to trying to achieve the effect  
23 of simulating neon lights.

10:26:25 24 Now, you are going to hear oh, well, it would have  
25 been inherent. what does inherent mean? That's a concept.



1 And basically, it means it must necessarily be so. So you may  
2 hear that, oh, it would be inherent to just get some light  
3 from the sidewalls, and it will bounce somehow up into this  
4 hollow tube.

10:26:48 5 well, you heard from Dr. Roberts that he didn't think  
6 that could happen because of these protuberances that actually  
7 lock that hollow tube in place. They actually project in, and  
8 they are going to block reflected light, even if there were  
9 any, from the sidewalls.

10:27:05 10 But frankly, the issue is, could it be? You can  
11 always say, maybe it could be. But could it not be? Yeah,  
12 maybe it could not be it. It can't be inherent if it ain't  
13 necessarily so. To be inherent, it must be necessarily be so.  
14 If it ain't necessarily so, it's not inherent.

10:27:25 15 So the inherency argument doesn't go anywhere in our  
16 view, because if Mr. Slayden thought he could get any  
17 reflective light to help increase the glow or the brightness  
18 of this tube on the top, don't you think he would have said  
19 something about it in his patent? And he didn't. There is  
20 not one word on that. He doesn't rely on that at all.

10:27:49 21 I believe I talked about obviously, frankly, until I'm  
22 starting to get blue in the face. But the real issue here is  
23 that's a tough test, and you need a pretty searching analysis  
24 for that. Again, you have to try to think back, not knowing  
25 the answer today, not knowing, yeah, now I know all about the

1 iLight patent and what they did to come up with a solution.  
2 You have to go back and say, without knowing that, would it  
3 have been obvious back then, in view of the prior art Fallon  
4 is relying on, to do what iLight did.

10:28:15 5 And I think you will find the question is no. The  
6 Patent Office certainly thought it wasn't obvious. And there  
7 are others, too. There's Fallon itself. It never did it and  
8 never thought about it until it saw iLight signs and realized  
9 its business was at risk. Then it said, as it told Sam's  
10 Club, we'd better -- we'll have something here that looks like  
11 iLight signs for you real soon. Took them over a year to do  
12 it. They didn't get around to it until 2005. But the  
13 inventors had already solved the problem way back in January  
14 of 2001 and filed their patent application back then.

10:28:53 15 In our view, Fallon's arguments, now that they are in  
16 trial, want to escape from the infringement issue that, oh,  
17 these basically -- the argument is, yeah, whether or not we  
18 took iLight's invention, the invention is no good. That's  
19 basically the argument. And we think that just doesn't hold  
20 water. That's to be expected from an infringer. Of course  
21 they are going to make that argument.

10:29:13 22 But we think that when you really look at the  
23 evidence, look at the job the Patent Office did, and look at  
24 the real world. It wasn't obvious to Fallon. They didn't  
25 know the solution. It never dawned on them until they saw

1 iLight's solution, and they said, we'd better do that, we're  
2 going to lose a lot of business.

10:29:34 3 Now, Dr. Roberts looked at all these arguments about  
4 obviousness that were raised by Fallon's expert. And you will  
5 find in his expert report, that's Trial Exhibit 30, at Pages 7  
6 to 12, if anybody wants any detail, it's Trial Exhibit 30,  
7 Pages 7 to 12, he takes apart all these other patents that you  
8 just got numbers on from Fallon's technical expert. Nice man,  
9 but he just rattled off some numbers and said, well, it would  
10 have been obvious.

10:30:01 11 If you do a searching analysis, though, I think you  
12 will find his analysis was pretty cryptic at best and not the  
13 type of analysis the Patent Office did and is trained to do.

10:30:17 14 The final argument that Fallon uses on invalidity,  
15 they want you to conclude that the claims don't mean anything,  
16 that they are indefinite, certainly tough to understand.  
17 well, claims are difficult to understand. That's the nature  
18 of legal writing, frankly. It's a legal definition. What  
19 you're doing is trying to reduce an invention to words, a  
20 concept of words, and make those words different than what  
21 came before, but encompass your invention. And that's never  
22 an easy task. We're all human. Nobody is perfect.

10:30:48 23 But a pretty good job was done here. At least in the  
24 Patent Office's view, those words were just fine. They were  
25 clear, and they were definite. Fallon now wants to escape and

1 say, oh, well, we were confused, and we don't understand it,  
2 and, therefore, you should toss these patents out.

10:31:04 3 we frankly think that makes no sense. Their own  
4 attorney back in April of 2005 understood it. He wrote back  
5 and said, oh, we don't infringe. Never really said much about  
6 it, but, we don't infringe. So he understood it. It's not  
7 until they get to court and want to get off the hook that they  
8 are now coming up with all these defenses, oh, it can't be  
9 understood.

10:31:27 10 Now, in sum -- that's always a good sign for you. The  
11 lawyer is saying in sum, that means he's getting to the end.  
12 But we believe it's pretty clear Fallon has not established by  
13 clear and convincing evidence this high burden that each of  
14 the claims of the three iLight patents that I've told you  
15 about that are in suit is invalid.

10:31:48 16 I would like to just focus for a minute on who thinks  
17 the iLight patents are invalid. Hopefully you won't at the  
18 end of the day, but we don't know that yet. But really, the  
19 only ones that do are Fallon's lawyers, of course. And their  
20 expert, Mr. Hathaway, who expressed his views here.

10:32:06 21 And now let's take for a moment and look at who  
22 believes the claims of the iLight patents are pretty good and  
23 are valid.

10:32:16 24 well, first of all, we have the guy that I talked to  
25 you a lot about, this primary examiner Sember, the guy who

1 knew all about Slayden's hollow tube invention and Slayden's  
2 patent, because he's the guy that granted it. And he's the  
3 guy that called it to iLight's attention and worked it out  
4 with iLight's lawyers, changed the claim so that they wouldn't  
5 -- the Slayden patent wouldn't be a problem for iLight's  
6 claims. And he is the guy that decided these claims are now  
7 in good form, they were clear and definite, were not  
8 anticipated, were not obvious, and I can issue these patents  
9 to iLight.

10:32:49 10 Now he's one that thinks the iLight patents are pretty  
11 good, and he had no stake in this dispute between iLight and  
12 Fallon.

10:32:57 13 Two others. There's James Rogan. You will see him on  
14 the page of the grant. He is the guy that signed off at the  
15 bottom after telling you that the patents met, the  
16 applications had met all the requirements for patentability,  
17 that include definiteness, that includes anticipation and  
18 obviousness. Those were not a problem. And he can't sign  
19 that grant -- he can't grant that patent unless that's the  
20 determination that the officials in the Patent Office make.

21 There was also John Dudus. He was another  
22 Commissioner of Patents. He signed off on the '262 and '970  
23 patents. Certainly these very high officials in the Patent  
24 Office had no stake in this dispute.

10:33:36 25 And there is Dr. Roberts. He studied the issues. He

1 looked at Mr. Hathaway's arguments, and he concluded in his  
2 mind that, indeed, there was insufficient evidence to find  
3 these claims were, one, indefinite, and -- I apologize -- were  
4 anticipated or obvious. He didn't think that was the case.

10:34:00 5 We also have Fallon's senior -- own senior engineer,  
6 closer in time to iLight invention, who said this just  
7 couldn't be done. Could we show that -- I think you have a  
8 clip that you saw before, but if we could just turn the lights  
9 down for a minute, please.

10:34:28 10 (Video playing:)

10:34:31 11 *I recall another visit with Fallon.*

10:34:32 12 *Go ahead.*

10:34:39 13 *If you want to be, you know. I visited Fallon at*  
14 *their trade show in Vegas once and spoke with one of their*  
15 *senior engineers. At the time -- this was later, but at the*  
16 *time I had a functioning piece of our prototype product in my*  
17 *pocket that was neon, looked like neon with LEDs. I remember*  
18 *pointing to Fallon's sign, putting my finger on the neon sign,*  
19 *and asking, can this ever been made out of LEDs. And he*  
20 *looked at me and said, no, it can't be done.*

10:35:19 21 (Conclusion of video playing.)

10:35:25 22 MR. VEZEAU: That's long before we got into trial.  
23 That's pretty powerful, I think. That's Fallon's own senior  
24 engineer, a man skilled in this field. He didn't believe this  
25 could be done.

10:35:37 1 And finally, and I'm going to leave this with you --  
2 finally is a good word, too -- we have Fallon's senior  
3 management who recognized it was iLight's patented technology,  
4 not Slayden's hollow tube or anyone else that stood in  
5 Fallon's way.

10:35:51 6 Can you play -- oh, by the way, that was Eric  
7 Eriksson, if you remember, one of the three iLight inventors.  
8 Now we're going to listen to the head of Fallon's Shanghai  
9 facility, Mr. Huo.

10:36:06 10 (Video playing:)

10:36:09 11 *You said if iLight gets a whiff of our filing -- files*  
12 *an objection, we are dead in the water. Why did you believe*  
13 *that?*

10:36:17 14 *That's just my opinion of how the patent process*  
15 *works.*

10:36:21 16 *What did you mean by that?*

10:36:42 17 *I -- I don't recall, but -- dead in the water.*

10:36:45 18 *You don't know what you meant?*

10:36:50 19 *I'm -- based on that -- again, this was written four*  
20 *years ago, so based on that, my interpretation right now would*  
21 *be that it would -- it could possibly block -- dead in the*  
22 *water. Again, my interpretation was that there was a prior*  
23 *art on the patent, and that's why we wouldn't get the*  
24 *approval. I don't recall why I would have said the objection,*  
25 *we would be dead in the water.*

10:37:28 1 MR. VEZEAU: I think that tells the whole story, a  
2 good part of the story.

10:37:33 3 I really thank you for your attention.

10:37:36 4 THE COURT: On behalf of the defendant?

10:37:38 5 MR. KITTREDGE: It's going to take us probably about  
6 five minutes to get set up.

10:37:42 7 THE COURT: Ladies and gentlemen of the jury, we'll  
8 take about a five minute recess. Don't discuss the case  
9 amongst yourselves until you receive all of the arguments of  
10 all counsel and the Court's instruction. It will be about a  
11 five minute recess.

10:38:01 12 (Jury out.)

10:47:49 13 THE COURT: We're in recess.

10:47:49 14 (Recess.)

10:47:52 15 THE COURT: Are we ready?

10:47:54 16 MR. KITTREDGE: Yes, Your Honor.

10:47:58 17 THE COURT: You can bring the jury in.

10:48:00 18 (Jury in.)

10:48:12 19 THE COURT: You can be seated. All right, ladies and  
20 gentlemen of the jury. We'll now hear closing arguments on  
21 behalf of the defendant.

10:48:19 22 MR. KITTREDGE: May it please the Court, ladies and  
23 gentlemen of the jury.

10:48:25 24 When we first met a little over a week ago, I believe  
25 I told you the case was going to be sometimes dry, sometimes a



1 little slow. I'm pretty sure it was, and for that I  
2 apologize, but thank you for your patience. We just need a  
3 little bit patience. We're just about done. And I am going  
4 to do as much as possible to keep my comments as focused and  
5 as brief as possible. I'm not going to go through all of the  
6 evidence you heard. I'm just going to hit some of the high  
7 points.

10:48:55 8 A couple of points that I would like to make clear,  
9 Fallon Luminous Products is in business, and it is in business  
10 to make money. We stand accused of that, and we're guilty. I  
11 happen to think that's what America is all about. There is  
12 nothing wrong with trying to make a profit, and nothing wrong  
13 with trying to develop better products so that you can make  
14 that profit.

10:49:21 15 ILight's inability to compete in the sign market, they  
16 refuse to accept any responsibility for themselves there.  
17 They are doing what has become far too common in America. And  
18 that is, when things don't work the way you want, you look  
19 around and find someone to sue. They are using the patent  
20 system to do that. We believe that they are abusing the  
21 patent system, much like your personal injury plaintiff often  
22 abuses the court system to get big damages that they really  
23 aren't entitled to.

10:49:55 24 If we can step back to talk about what's really at  
25 issue in this case. What's really at issue in this case is

1 whether or not Fallon's signs infringe the patents and whether  
2 or not iLight's patents are valid.

10:50:11 3           There was a lot of detailed scientific testimony about  
4 the science behind these products. What are we really talking  
5 about? You've got a basic channel, just like the channels  
6 that Fallon had in its original neon signs, and just like  
7 channels have been used in the sign industry for decades.  
10:50:37 8 You put a row of lights in that channel, again, just like the  
9 sign industry has been doing for decades. You put a plastic  
10 diffuser over it so you get a nice, uniform, even glow, just  
11 like the sign industry has been doing forever.

10:50:50 12           Just because all of a sudden you want to come into the  
13 Patent Office and say, that diffuser that has been used  
14 forever is really this fancy waveguide doesn't change the  
15 fundamentals that are at issue here.

10:51:03 16           Now, you heard an awful lot of testimony -- I'm sorry,  
17 an awful lot of argument about the timeline and all the evil  
18 things that Fallon was doing, and all of the evidence that  
19 supposedly shows Fallon was copying iLight's sign.

10:51:17 20           That's their whole case. That is the principal basis  
21 of their case, is trying to convince you that Fallon went out  
22 and deliberately developed this sign that's a copy of the  
23 iLight sign that was in existence in this case.

10:51:35 24           You met Chuck Nelson last Friday. He testified about  
25 his 20 years of experience in the sign industry, making

1 lighted signs. He testified at length about the process by  
2 which they go through developing signs, by how they have made  
3 regularly signs that used these same features, rows of lights,  
4 inside channels, plastic lenses, diffusers over that.

10:52:00 5 He testified about how Sam's Club did, indeed, come to  
6 Fallon and asked if it could make an LED version of the old  
7 oval neon sign. And he explained to you how they did that.

8 He testified at length about how he developed the sign  
9 that's accused of infringing, went out into the shop, looked  
10 at the signs they had been making, used his experience with  
11 channel making signs, and realized, using the basic shape and  
12 the basic channels from the existing neon sign that they could  
13 put in lights inside and cover those with a plastic diffuser.

14 Now, where did he get that plastic diffuser? He chose  
15 from a set of samples that he had in his desk, the kind of  
16 samples he had used forever, finds one that he thinks looks  
17 good, and then tries it, adjusts the dimensions a little bit  
18 as they start playing with the prototype and the lens. But it  
19 pretty much works pretty good from the beginning. It's not  
20 rocket science.

10:53:24 21 Plaintiffs want you to think it's rocket science  
22 because they use terms like LEDs and terms like waveguide and  
23 terms like leaky waveguide. You don't get to take over the  
24 prior art and the prior art way of doing things by all of a  
25 sudden using fancy words like waveguide and leaky waveguide.

10:53:43 1 It's just a plastic tube like has been used in the sign  
2 industry forever.

10:53:48 3 iLight didn't invent LEDs. They don't claim to have.  
4 They didn't invent the idea of using LEDs in signs. They  
5 don't claim that. They certainly didn't invent using plastic  
6 diffusers to get you a nice uniform glow from those LEDs or  
7 any other lens source.

10:54:04 8 which makes another point that probably hasn't been  
9 made clear yet in this trial. iLight's patents aren't limited  
10 to the use of LEDs. The patents clearly and expressly say  
11 other lighting sources can be used. Any other kind of  
12 lighting. They would prefer LEDs, but it's not limited to  
13 LEDs.

10:54:22 14 If you look at the claims that are being asserted in  
15 this case, none of them call for LEDs. Any kind of light can  
16 be used, like the sign industry has been doing forever.

10:54:35 17 Of course, you don't have to rely on just Chuck's  
18 testimony to decide that Fallon's LED version of its Open sign  
19 is not a copy of iLight's. You can look at them for  
20 yourselves. There is a lot of common sense involved in saying  
21 these are very, very different. You look at the way their  
22 waveguide is constructed. It might be easier if you look at  
23 this piece here, the Plexineon. The testimony and the  
24 evidence is that they do have this big thick extruded solid  
25 rod, which is what they describe as a leaky rod. It sits on

1 top of a housing, all unitary construction, all linked  
2 together. It's got a row of LEDs inside there, all part,  
3 again, of the same unitary construction. You've got the  
4 internal light sidewalls that reflect and some external  
5 sidewalls that are darker, light absorptive.

10:55:47 6 Fallon sends the channels, like you saw previously, I  
7 think between the LEDs and the plastic diffusers. The LEDs  
8 aren't in there, but you can picture where they are. And the  
9 issue is the plastic diffuser, again, a plastic diffuser that  
10 is a standard sample that Chuck Nelson just pull out of his  
11 desk.

10:56:12 12 You just cannot seriously credit the idea that this  
13 sign is a copy of that sign. And if you look at them, and ask  
14 yourself which one is more desirable, you may have a  
15 difference of opinion, but it's easy to imagine many people  
16 might find this sign more desirable just because of the way it  
17 looks, it's more professionally made, it doesn't have cheap  
18 foam stuff on it, it can be repaired.

10:56:49 19 If you remember, looking at the Plexineon, this is all  
20 glued together, some kind of epoxy in there, around every  
21 single LED. If one LED in this burns out, it's burnt out  
22 forever.

10:57:02 23 You can actually get into this sign and replace LEDs  
24 if one burns out. So what we get to then, a lot of discussion  
25 about the first letter alleging, gosh, pay attention to our

1 patents. We think they are special. That was in March of  
2 2005. Fallon send it to its patent lawyers. Patent lawyers  
3 look at the patent and said, boy, they describe a really big  
4 thick rod-like waveguide. We just have plastic diffusers.

10:57:31 5 They have these internal side reflecting sidewalls, the patent  
6 talks about them being light colored, and that's what they  
7 have in theirs. We just have black.

10:57:41 8 The black sidewalls are shiny. There is no doubt  
9 about that. Chuck Nelson explained that shininess is because  
10 of the manufacturing process, the injection molding, tight  
11 pieces like that, you polish the tool, and that results in a  
12 shiny sidewall.

10:57:55 13 But back to the letter. Writes back and explains, we  
14 don't believe we infringe. Nothing back from iLight's  
15 counsel. Nothing back explaining why we think -- why iLight  
16 thinks they are mistaken. Radio silence all the way through  
17 December. Well, between that time, then a couple of weeks  
18 after that was sent, Chuck Nelson has a meeting. He meets the  
19 lawyer who wrote the letter for Fallon. He sees the letter.  
20 He says, that kind of makes sense. But he doesn't stop there.  
21 He goes and gets a copy of the patent.

10:58:32 22 Can I see the first figure? This is the figure from  
23 the '238 Patent. This is the same slide I showed you in the  
24 opening at the beginning of the Trial. Chuck reads through  
25 the patent. He doesn't study it in detail. He's not a patent

1 lawyer. Gets a general understanding of what the patent is,  
2 looks at the figures. And then he does have a copy by then of  
3 iLight's sign. And he looks at the sign, says, boy, that  
4 patent looks to me like it describes exactly the sign that  
5 iLight has built. He said, our sign is nothing like that.

6 Now, that was reasonable. In fact, Mr. Cleaver  
7 testified that he believed, he agreed, a reasonable person in  
8 the sign industry could look at their patent, look at the  
9 figures, look at the claims, and it would be reasonable to  
10 think, this sign doesn't infringe. He said he didn't agree  
11 with it, but he said it was a reasonable conclusion.

10:59:28 12 Doug Bagin, the president of the company, did the same  
13 thing. It was a little later in time. He had gotten another  
14 letter by then from iLight's lawyers. He had asked his patent  
15 lawyers to take a look at it again. They looked at it a  
16 little more carefully, in a little more detail. Told him they  
17 didn't believe it infringed. He is the CEO of the company,  
18 president of the company.

10:59:54 19 That's usually enough. You hire your lawyer to help  
20 to make decisions like that. He kind of put it out of his  
21 mind. He said he did the same thing Chuck did. He looked at  
22 the patent, read through it, not in detail. Looked at the  
23 signs, said they are different. They are as different as  
24 night and day. And that's not the end of the analysis that  
25 you guys have to do. And I didn't want to pretend otherwise.

1 If we could see the next line.

11:00:20 2 This is a case about infringement and validity. And  
3 you have seen tons of evidence, listened to tons of evidence,  
4 about infringement and validity.

11:00:32 5 Most of the evidence has focused on, again, these same  
6 claim terms that I highlighted at the beginning of the trial.  
7 And I'm going to be talking about those in summary form. I'm  
8 not going to go through each claim or each element in detail  
9 for you.

11:00:41 10 But in summary form, before I get to that,  
11 infringement and validity -- it may have seemed a little  
12 confusing with the evidence that you were hearing all week,  
13 because it probably looked at times like both sides were  
14 trying to prove similar things, that these claim elements are  
15 there, but they are not there.

11:01:01 16 The reason is, infringement and validity are two sides  
17 of the same coin. To prove infringement, plaintiff has to  
18 prove that each one of these limitations is found in iLight's  
19 products -- is found in Fallon's products. To prove  
20 invalidity, Fallon has to prove that each one of those  
21 limitations is found in the prior art. Either directly, or it  
22 would be an obvious extension. And that's why there was that  
23 kind of evidence coming in on both sides.

11:01:32 24 If we could see the next line.

11:01:35 25 Now, this is a summary slide again of those same key



1 points. I'm summarizing the evidence that has come in on  
2 these issues focusing on infringement. Again, if we prove --  
3 if you find that one these elements is missing, then it  
4 doesn't infringe. An awful lot of testimony on the word rod,  
5 and whether or not this is a rod, rod-like, a solid rod. We  
6 have made it very clear we do not believe this is a rod. It's  
7 a hollow arch. You can see the hollow in here. It's neither  
8 a rod and certainly not solid. It's a hollow thin diffuser.

9           There was competing testimony from Mr. -- sorry, Dr.  
10 Roberts. You may remember this. Dr. Roberts testified last  
11 week that indeed this was a rod, this was a solid rod. If we  
12 roll it up, he testified it's still a rod. But even though  
13 this part is solid, it's not a solid rod, it's a hollow rod.

14           He also testified -- and this is where it gets  
15 confusing -- that if I put it in a horseshoe shape, it's still  
16 a rod, but not solid. And if I just straighten it out a  
17 little bit, it all of a sudden becomes a solid rod.

11:03:16 18           You can't rationally explain those two different  
19 analyses. And you have to ask yourself why Dr. Roberts  
20 testified that way. Well, he testified that way because, if  
21 he didn't, iLight losses. If this isn't a solid rod, they  
22 lose; if this isn't a hollow rod, they lose.

11:03:37 23           There was also a lot of testimony about waveguides and  
24 leaky waveguides. Again, we presented substantial evidence  
25 from our expert witness Kevin Hathaway that it really is just

1 a hollow, thin diffuser just like they told Patent Office was  
2 not covered by their patents.

11:03:58 3 The testimony from their expert said, well, any  
4 plastic diffuser that you put over a row of lights becomes a  
5 waveguide. That's not what they told the Patent Office, but  
6 that's what they are telling you in this trial.

11:04:16 7 We talked about preferentially scattering light.  
8 Again, you remember the light through the square sample of  
9 material that Kevin Hathaway showed you that gives you a nice  
10 uniform pattern. That's not preferentially scattering.

11:04:34 11 On the other hand, what Dr. Roberts said was -- again,  
12 remember the hours of testimony about all the science on what  
13 waveguides are and how you achieve waveguides and what  
14 preferentially scattering is and how you achieve it, and  
15 Snell's Law and all that crazy stuff.

11:04:52 16 But in order to decide whether or not light Fallon's  
17 plastic diffuser preferentially scattered, he shined a light  
18 through it and looked at it and said, yeah, it preferentially  
19 scatters.

11:04:57 20 In order to decide whether the plastic diffuser is a  
21 waveguide, he didn't go to any of that science that he spent  
22 hours telling you about. He shined a light through it and  
23 said, yeah, that's a waveguide.

11:05:15 24 Reflectivity. There was a lot of testimony and a lot  
25 of confusion about reflectivity and light absorptive surfaces.

1 No doubt the surface is inside, very shiny and has a  
2 mirror-like surface. The testimony was, any surface that you  
3 can see will be reflective, both inside and outside. Any  
4 surface you can see will be light absorptive, both inside and  
5 outside.

11:05:38 6 But most important, both experts agreed that if you  
7 look at the inner sidewall and the outer sidewall of the  
8 channel that the LEDs are in, they have essentially the same  
9 total reflectivity. It's a different kind. All this  
10 testimony about specular and diffuse reflectivity. The same  
11 total. One is shiny; one is not. But the same total means  
12 the same amount of light ends up getting up to the diffuser.

13 That was the basis of Mr. Hathaway's testimony, that,  
14 as the Court has defined it, it really isn't reflective. It  
15 doesn't enhance the output any more than the one on the  
16 outside would, and, therefore, it's not reflective.

11:06:26 17 Now, Kevin Hathaway gave far more detailed analyses  
18 and detailed claims, mapped out all the claims and all the  
19 reasons why these various limitations aren't met by Fallon's  
20 products with respect to all the different claims. I'm not  
21 going through those charts with you. They are in his expert  
22 report. They have been submitted into evidence. His  
23 infringement and noninfringement report is Exhibit 877, if you  
24 care to look through it.

11:06:52 25 I'm going to next turn to the validity issues. There

1 is a first concept here with validity. Again, this is the  
2 other side of the coin. And I'm going to talk first about  
3 anticipation and obviousness.

11:07:03 4 One of the instructions that you are going to get from  
5 the Court on obviousness is, if the claimed invention is  
6 really just a combination of known elements that produce a  
7 predictable result, that's one of the ways you determine it's  
8 obvious.

11:07:21 9 Again, think about the combination of known elements  
10 that Chuck Nelson put together. Signs like he has been making  
11 for 20 years. A channel for letters. A light -- string of  
12 lights at the bottom of that channel. And a plastic diffuser  
13 to cover that channel just like he has been doing for 20  
14 years. That's a combination of known elements that got a  
15 predictable result, a nice uniform glow right there in the  
16 channel, happens all the time.

11:07:52 17 Chuck's testimony alone demonstrates it's obvious.  
18 The truth is -- and this is where I think the patent system is  
19 being abused here -- there might be something here, some  
20 invention here. But if they are going to read their patent so  
21 broadly that it captures what Chuck did -- you know, Chuck is  
22 not some Ph.D. in optics. He's not some master's degree in  
23 optics. He's a guy who has just worked in the sign industry  
24 for twenty years. If their claims capture what he did, it's  
25 got to be obvious. Otherwise, you are saying, Chuck wasn't

1 smart enough to know that what he was doing was an invention  
2 that someone else had. If he was only smarter, it wouldn't be  
3 an invention.

11:08:39 4 If I could see the next slide, Exhibit 77.

5 Obviousness in this case is not just based on Chuck's  
6 testimony. We are basing it very heavily on Slayden patent.  
7 And it's absolutely right that that had the same primary  
8 examiner examine the Slayden patent as examined the  
9 patents-in-suit. That was no big surprise.

11:09:02 10 The idea that that examiner knew about Slayden -- of  
11 course he knew. He used Slayden to reject their patent. I  
12 think Mr. Vezeau described that as he brought it to our  
13 attention so we could discuss it. He rejected their patent  
14 based on Slayden and based on his understanding of Slayden.

15 We're asking you to conclude that, yes, the Patent  
16 Office made a mistake here. Yes, a government employee in  
17 Washington made a mistake here. It's not the first time. It  
18 obviously won't be the last time.

11:09:32 19 But you should understand how they made that mistake  
20 and why. They made mistake because they relied on what iLight  
21 told them.

11:09:41 22 If we can see Exhibit 627.

11:09:45 23 Remember, they rejected it on Slayden. That's the  
24 '186 Patent. Again, they didn't just bring it to their  
25 notice. They rejected the patent.

11:09:53 1 And what iLight told the Patent Office, what they told  
2 Mr. Sember was, you don't understand it exactly right.  
3 Slayden, the '186 patent, describes the use of a hollow thin  
4 walled translucent diffuser that provides no preferentially  
5 scattering.

11:10:08 6 The Patent Office relied on that and said, okay, if  
7 you are going to exclude that from your inventions, then maybe  
8 you get one.

11:10:17 9 Now, you may remember when I was talking to Dr.  
10 Roberts yesterday, he said, in fact, Slayden wasn't just a  
11 thin-walled translucent diffuser, it was a waveguide. In  
12 fact, it was a leaky waveguide. In fact, it did provide  
13 preferentially scattering of light.

11:10:42 14 That testimony demonstrates that he was careful to say  
15 that's based on the Court's claim construction today; maybe  
16 the examiner didn't have that. That demonstrates, as far as  
17 we know, sitting here today, what iLight told the Patent  
18 Office was just wrong. What the Patent Office relied on was  
19 just wrong.

11:11:18 20 The next slide helps demonstrate this.

11:11:22 21 Remember, they said -- let me -- to be fair to Dr.  
22 Roberts, he testified exactly as I said, and then when his  
23 client, the lawyer, got up and asked him some questions, he  
24 change his testimony. Right in front of you. Changed his  
25 testimony 180 degrees.

11:11:39 1           why did he change his testimony? He changed his  
2 testimony because, under the testimony that he gave when he  
3 was talking to me, iLight loses. I think he was trying --  
4 trying to tell the truth. I think he has just been given a  
5 job that's undoable. He is been given a job to walk this line  
6 that can't be walked. He's doing his best, but you saw him go  
7 back and forth, whip saw.

11:12:13 8           If we could see the next exhibit, Exhibit 29 N.

11:12:17 9           This is Dr. Roberts' exhibit from his expert report on  
10 the plastic diffuser that Fallon uses, the same thing that he  
11 concluded is not only a rod, but a solid rod, and a waveguide  
12 that preferentially scatters.

11:12:36 13          Let's go to the big three slide.

11:12:42 14          Now, this is a slide composite of images -- let me  
15 make sure you understand what each of them are. On the upper  
16 right, this is Figure 3 from the '238 Patent, the same figure  
17 in all three patents. Covered in blue for you, the big, solid  
18 rod-like waveguide that iLight disclosed in its invention.

19           Colored in blue for you over here, what the Patent  
20 Office said was a waveguide, disclosed and taught by Slayden.  
21 And coming to you down here, the hollow arch plastic diffuser  
22 that Dr. Roberts and iLight says is really a solid rod-like  
23 waveguide.

11:13:24 24          They can't have it both ways. They certainly can't  
25 have it both ways based on what they told the Patent Office

1 and what Dr. Roberts testified to yesterday.

11:13:34 2 what they are effectively trying to do here, what Dr.  
3 Roberts and iLight are trying to do here is to say, we  
4 disclosed big, solid rod waveguides. We get ownership of all  
5 possible shapes of plastic diffusers put across a row of LEDs,  
6 all possible shapes, the whole universe, from this shape to  
7 this shape. We own that, because we told you about this. Oh,  
8 except, except, we don't own this shape. If we owned this  
9 shape, there would be a battle.

11:14:13 10 So the only thing they carved out of their universe is  
11 the horseshoe shape of Slayden and, of course, the circle  
12 shape of Slayden. Slayden is limited strictly to only to the  
13 pictures in his patent. They are not limited to anything.

14 where is the justice in that? There is certainly no  
15 justice for Fallon in that. Certainly no justice for Mr.  
16 Slayden.

11:14:45 17 Now, Kenneth Hathaway gave you a lot of testimony on  
18 these topics. Dr. Roberts gave you conflicting testimony.  
19 Thursday he said one thing. Wednesday he said -- I'm sorry,  
20 Thursday he said one thing; yesterday he said another. Then  
21 when he was talking to me, he said a third thing. Then when  
22 his client got up asked him some more questions, he said a  
23 fourth thing. We think he's not a reliable witness.

11:15:07 24 But in any event, I wanted to make sure I mentioned  
25 Kevin Hathaway. I'm not going through in great detail



1 everything he testified to. And indeed, we sped things along  
2 by putting in some of his evidence in directly through his  
3 reports. If you are interested in seeing all the painful  
4 detail where he marches through each and every claim, each and  
5 every element, showing how it was anticipated by or made  
6 obvious by the Slayden patent. That's his Exhibit 758. He  
7 also has a claim chart where he marches through it in great  
8 detail. And that's Exhibit 742, Kevin Hathaway's claim chart  
9 explaining in detail why this latent patent invalidates these  
10 claims.

11:15:55 11 I would also next like to turn to the issue of  
12 indefiniteness. It's true, the Patent Office issued this  
13 patent. It's true the examiner thought the claims had some  
14 meaning that could be understood.

11:16:05 15 The claims are interpreted as a matter of law, as His  
16 Honor has told you, and his Honor has given us his  
17 interpretation, the interpretation as a matter of law. And  
18 it's consistent with the way iLight is applying these claims  
19 in this case, or at least trying to. And the way that  
20 application is happening is why these claims are indefinite.  
21 And let me give you a couple of examples.

11:16:28 22 A lot of testimony about reflectivity and  
23 absorptivity, two of the key claim limitations that we think  
24 are indefinite. Both experts testified all surfaces are  
25 reflective, and all surfaces are absorptive. Both experts

1 testified that the key surfaces we're talking about here have  
2 essentially the same total reflectivity.

11:16:49 3 So the question becomes, as a person of ordinary skill  
4 in the art, if I want to make something like this without  
5 infringing, how do I know when it's reflective enough to  
6 infringe or not reflective enough so I don't infringe? And if  
7 it's not reflective enough so I don't infringe, does that mean  
8 I now have a light absorptive layer on the outside?

11:17:13 9 There is just no way for somebody to figure out when  
10 or when you don't infringe. The same thing with waveguide and  
11 preferentially scatters. Again, a lot of testimony about what  
12 waveguides are, how do you make them, the science behind  
13 waveguides. But at the end of the day, Dr. Roberts testified,  
14 any plastic -- translucent plastic diffuser that you put over  
15 a row of lights is a waveguide. So that means everything the  
16 sign industry has been using for 20 years is a waveguide; they  
17 just didn't know it, because they didn't have a Ph.D. in  
18 optics.

11:17:49 19 How do you keep doing what you have been doing for 20  
20 years with that definition of a waveguide? The people out  
21 there working in this field just can't figure it out. The  
22 same thing with preferentially scatters. Said that saying,  
23 any piece of plastic diffuser put over a channel of lights is  
24 going to preferentially scatter. No way to figure out when I  
25 have a diffuser or when I have a waveguide because, again, all

1 diffusers are waveguides.

11:18:16 2 But they told the Patent Office their patent doesn't  
3 cover thin-walled diffusers. They can't have their cake and  
4 eat it, too, here. If the patent doesn't cover thin walled  
5 diffusers, then you've got to have a clear understanding of  
6 the difference between a waveguide and a thin-walled diffuser.  
7 Dr. Roberts was crystal clear. Any diffusive piece of  
8 plastic, translucent plastic, that I've put over those lights  
9 -- oh, yeah, that's a waveguide. It's got waveguide  
10 properties. The only thing that doesn't, apparently, is the  
11 horseshoe shape from Slayden, because that was specifically  
12 discussed in the Patent Office.

11:18:56 13 Human observer. You heard repeatedly, any time Dr.  
14 Roberts got in trouble, oh, well, it's based on the  
15 appearance. And I'm a human observer, and based on my  
16 observation, I think that infringes.

11:19:12 17 Or if it's a validity issue, it's a human observer.  
18 Based on my observation, I don't think that would infringe,  
19 but I would really have to see more, so, therefore, that  
20 doesn't make it invalid.

11:19:22 21 This human observer test is fraught with problems.  
22 Who is the human? And how does that human decide? How does  
23 that inventor of a new product decide it might violate their  
24 human observer test.

11:19:37 25 Now, it has been said about profanity -- not

1 profanity, about obscenity: I'm not sure I can define  
2 obscenity, but I know it when I see it. That's okay for the  
3 Supreme Court deciding issues about obscenity. But that's not  
4 okay for the patent system. Patent systems require that you  
5 have claims that can be understood by people of skill in the  
6 art so that they know where your invention fits and where it  
7 doesn't.

11:20:03 8 That human observer test makes it impossible to know  
9 when you might infringe and when you might not. Basically,  
10 what it says is, you infringe if I've got a smart slick lawyer  
11 who comes in and explains to you that you violated our human  
12 observer test.

11:20:24 13 THE COURT: I hate to interrupt, but will counsel  
14 approach the bench?

11:20:26 15 (Whereupon, a bench conference was held, out of the  
16 hearing of the jury, to wit:)

11:20:39 17 THE COURT: If the human observer act is part of the  
18 law, aren't you arguing for jury nullification?

11:20:45 19 MR. KITTREDGE: No. I'm not, Your Honor. I'm arguing  
20 a human observer is indefinite. That's one of the  
21 indefiniteness arguments.

11:20:52 22 THE COURT: But it's one of the legal standards to  
23 determine. You're saying that that's not workable, and that's  
24 a jury nullification argument.

11:21:00 25 MR. KITTREDGE: No, because if you look at the cases

1 we cited, this is exactly what the case law says, the type of  
2 language that makes invalidness indefinite.

11:21:11 3 Again, we are just asking for an advisory decision.  
4 We can brief this to you afterwards. I'm done talking about  
5 that test, anyway.

11:21:18 6 MR. VEZEAU: I do suggest, Your Honor, I was sitting  
7 there twitching, and I don't like to interrupt counsel, but --

11:21:25 8 THE COURT: I really hated to do it.

11:21:26 9 MR. VEZEAU: I know. But this to me is a little  
10 improper here. He is substituting -- these are the terms he  
11 used in his examination of witnesses. Dr. Roberts didn't  
12 adopt that. This is something he put in his mouth.

11:21:38 13 MR. KITTREDGE: I disagree completely.

11:21:40 14 MR. VEZEAU: And these signs, these are illuminating  
15 devices --

11:21:44 16 THE COURT: Well, I'm not going to go that far.

11:21:45 17 MR. KITTREDGE: I'm done with this topic.

11:21:48 18 THE COURT: If he's done with it, let's move on. I'll  
19 see if I need to address it further.

11:21:59 20 MR. VEZEAU: Thank you, Your Honor.

11:21:59 21 (Conclusion of bench conference.)

11:22:12 22 MR. KITTREDGE: Finally, I was getting ready to move  
23 into some of Mr. Cleaver's testimony. A big part of iLight's  
24 claims that it suffered horrible, horrible damage because of  
25 Fallon getting into the sign business. Remember the Camel

1 sign they were so proud of. Remember they showed that big  
2 peak in sales in 2005. The big peak in sign sales was all a  
3 result of selling 30,000 units of these Camel signs in 2005 to  
4 R.J.R. Reynolds. They haven't sold any since. It has been  
5 four years. They haven't sold any since.

11:22:44 6 what Mr. Cleaver then testified to was, I don't know  
7 why they haven't bought any more. I said, well, do you think  
8 it's because maybe they might have some concerns about the  
9 quality? He said, I don't know. I asked him, well, do you  
10 know who is selling to them? No, I don't know.

11:23:00 11 He doesn't know who is selling to them. He doesn't  
12 know why they haven't bought again in four years. But he  
13 wants you to make the assumption that somehow that's Fallon's  
14 part.

11:23:20 15 This is a chairman of what's supposed to be a sign  
16 company. His biggest customer ever. A sign that he's proud  
17 of because of all the awards. He doesn't know why they never  
18 bought it again. Actually, he wouldn't admit to that. He  
19 said more than zero was sold, but he couldn't give us anything  
20 more than that. So maybe one or two more were sold. He  
21 doesn't know why they weren't ever bought again, and doesn't  
22 know who is supplying to R.J.R. Reynolds now. He is a market  
23 research specialist.

11:23:43 24 If you credit his testimony that he doesn't know any  
25 of that, the Chairman of the sign company, market research

1 specialist. This is a company that isn't really in the sign  
2 business.

11:23:57 3 Now, I'm going to be very brief about damages. You  
4 heard from Carl Degen. He testified about the same reasonable  
5 royalty analysis. Both he and Walter Bratic applied the  
6 Georgia-Pacific factors. Carl Degen opined about how  
7 reasonable businessmen sitting down before any this happened,  
8 what they would do to come up with a reasonable royalty. And  
9 he opined that there could be a two percent royalty. I'm not  
10 going to go through the details and show you everything. You  
11 saw it all. His expert report is in evidence as Exhibit 956  
12 if you want to look at it again.

11:24:35 13 Let's contrast some of what he said to what Walter  
14 Bratic said. Walter Bratic reached an opinion of a 7 percent  
15 royalty. They would have agreed -- reasonable businessmen  
16 would have agreed to a 7 percent royalty when the projected  
17 income was only 7.7 percent. No reasonable business people  
18 are going to agree to give away all of their profits before  
19 they go into a new business. If you have to do that, you  
20 don't go into the business.

11:24:59 21 Walter Bratic also complained that there was an  
22 allocation of overhead. That's the way you do business plans.  
23 When you are trying to go into a new business, you look at  
24 what your overhead is, and you allocate those overhead costs.  
25 Nobody is going to go into a business without figuring out how

1 you allocate that overhead.

11:25:20 2           You may remember it wasn't just Walter Pratt and Carl  
3 Degen you heard from. Leah white, the CFO of Fallon, came in  
4 and testified Friday afternoon. She gave some really nice  
5 common sense testimony about what a business needs to be  
6 profitable and about expenses. Remember, she give that  
7 paycheck analogy, how you take that paycheck home, even after  
8 taxes are taken out, that really isn't your net because you've  
9 got bills, you've got mortgages to pay, maybe car payments,  
10 utility, groceries, clothing for your kids. At the end,  
11 that's your net. And that's what you decide when you are  
12 deciding whether you are going to take on a new expenditure in  
13 life. You look at what you have at the end after you have  
14 paid everything you already have to pay.

11:26:13 15           The last thing I want to finish with is reviewing some  
16 of the testimony of Dr. Roberts on the Slayden reference. If  
17 I can see that slide, please. Now, I don't know if you can  
18 see that from back there. I would hope you can. Expand it a  
19 little bit without going off the screen. That is probably the  
20 same.

11:26:43 21           But with respect to simulating neon, again, this is  
22 what I was talking -- Dr. Roberts was talking with me  
23 yesterday morning about Slayden. I asked him if it simulates  
24 neon. Again, the plastic slotted tube or hollow tube,  
25 whatever you want to call it. He said, yes, it does.



11:27:01 1 Now, what he did was he read that, yes, Slayden  
2 describes what he is doing now.

11:27:09 3 I asked him: Is that slotted tube a leaky waveguide?  
4 He said: Yes.

11:27:14 5 Question. And it will also be a leaky waveguide?  
6 Answer. Yes.

11:27:20 7 I asked him: Do you agree it's a rod?  
11:27:24 8 That was with respect to both the hollow tube and the  
9 horseshoe-shaped one.

11:27:28 10 He said: Yes.

11:27:31 11 And specifically, the slotted tube in Figure 4 is a  
12 rod or rod-like member within the Court's definition?

11:27:37 13 Yes.

11:27:42 14 I asked him: Does it preferentially scatter light?  
15 So, it does preferentially scatter?

11:27:49 16 Answer: Yes.

11:27:53 17 I asked him: Would there be light reflective surfaces  
18 in Slayden?

11:27:58 19 Answer: Yes. I would agree they may be light  
20 reflecting, even though he says flat black. Not all  
21 surfaces reflect light.

11:28:09 22 I asked him: Are the exterior surfaces going to be  
23 light absorptive? Slayden certainly discloses light absorbing  
24 exterior surfaces?

11:28:20 25 Answer: Yes.

11:28:23 1 In fairness to Dr. Roberts, his client, Mr. Scruton,  
2 got up and asked him a lot of questions, and he changed his  
3 answers to a lot of these. Not all of them, but a lot of  
4 them. Why did he do that? If he didn't do that, iLight  
5 loses. He is just doing his job.

11:28:46 6 That's all I have for you today, ladies and gentlemen.  
7 I may get a minute or two more later, I don't know. If I  
8 don't, I would ask you to think about what I would say --

11:28:53 9 THE COURT: That's a matter for the province of the  
10 Court, counsel.

11:28:57 11 MR. KITTREDGE: And with that, we leave Fallon's case  
12 in your hands.

11:29:12 13 THE COURT: For the plaintiff?

11:29:15 14 MR. VEZEAU: Thank you, Your Honor. Your Honor, I  
15 have very little. And I'm sure you will be happy to hear  
16 that. And I really will not belabor this.

11:29:29 17 You have heard now this morning a couple of lawyers  
18 arguing very hard for their client. And that is to be  
19 expected. This is an important matter for our clients. It  
20 means money to Fallon; it means a lot to Mark Cleaver and his  
21 company and a lot of people that are employed by his company.

22 But what you heard was arguments. Now, very candidly,  
23 the Judge has told you, and he will tell you again, the  
24 arguments are not evidence. The evidence are the documents  
25 that have been received in evidence and you will have in the

1 jury room, and the evidence is the testimony of the witnesses,  
2 not what I say as a lawyer for iLight, and certainly not what  
3 Fallon's lawyer says as a lawyer for Fallon. So I think  
4 that's an important point, and hopefully the arguments have  
5 been helpful in focusing you on the issues. But they don't  
6 decide cases; it's the evidence.

11:30:23 7 And frankly, I went through the evidence earlier and  
8 the testimony, we went through the evidence, and much of the  
9 damning evidence in this case and the issues of infringement  
10 are Fallon's own internal documents.

11:30:36 11 And you heard the testimony from Fallon's own  
12 witnesses. We didn't make that stuff up. We got those  
13 documents from Fallon. That's what we put in front of you.

14 Now, it's kind of a switch here made with these signs.  
15 We never said that this design, if you will, was a copy of  
16 iLight's products. But what was copied was the technology.  
17 The invention. The invention is not the design or the shape  
18 of the letters or whatever, it is what's used to make the  
19 designs.

11:31:11 20 And that was pretty clear to Fallon. Remember, Tim  
21 Fallon told the Sam's Club buyer, we're going to give you a  
22 sign that's like iLight's. That's exactly what they did.  
23 Because iLight had provided its LED design with its partner  
24 here in Cookeville to Sam's Club, and that included the new  
25 LED technology. And that's what Tim Fallon assured Sam's Club

1 they would wind up providing to Sam's Club.

11:31:39 2 Now, another point here, and something to take home, I  
3 think, and I want to make this very clear. iLight does not  
4 have to prove the claims of its patents are valid. That's not  
5 iLight's burden at all. And the reason for that is that the  
6 Patent Office already made that determination. It is only the  
7 burden of Fallon to prove that each and every claim that we  
8 put in front of you, the entirety of the claim, is invalid.  
9 And that burden is by a clear and convincing evidence. So  
10 iLight doesn't have a burden there. That burden is on Fallon.  
11 That's a heavy burden.

11:32:14 12 You saw Dr. Roberts was taken to task a little bit.  
13 Dr. Roberts you saw struggle with the words. Words are  
14 difficult. And the reason why he struggled? He was very  
15 candid with you. He didn't blow smoke. He said he was a  
16 scientist. That's what he does. He's not a lawyer. He's not  
17 a judge. And then all of a sudden he had to come in this  
18 trial and hear from the Court what the Court's view was on  
19 what the claim terms mean, which he struggled with because he  
20 had his own scientific understanding. And he was trying to  
21 reconcile that.

11:32:52 22 And I think you heard him yesterday be very candid  
23 about that, that he struggled with that, finally understood,  
24 finally came to terms with it. And he said in his view at the  
25 end that what the Court defined as rod or rod-like was not Mr.

1 Slayden's hollow tube. And he explained that, as the Court  
2 defined it -- and you will get those definitions -- a rod is a  
3 slender strip or a bar that is shaped, that has the  
4 appearance, of a wand. And that's what he viewed it as. And  
5 he said, that's not a hollow tube. That's not Mr. Slayden's  
6 device, because it's not a slender strip or a bar.

11:33:29 7 And he also got into how, when this was assembled, it  
8 then does -- in the Fallon device, it then does take that  
9 shape of the form of a neon tube, which is the shape of a  
10 wand, if you will.

11:33:41 11 So I don't think -- I think if you understand that  
12 this man is coming from a scientific arena. This is not his  
13 game, playing in court. He came in here to give you his  
14 testimony candidly. He was very candid with you. You saw him  
15 struggle. But I don't think that means he was dishonest. I  
16 think that means he was struggling with his issues. And he  
17 ultimately gave his views. It's up to you to judge whether  
18 those were credible or not. But the man was obviously trying  
19 to be with you as honest as he could be.

11:34:11 20 You also saw apparently Mark Cleaver attacked for some  
21 reason. You can decide whether that was appropriate or not.  
22 I think you heard Mark Cleaver testify before you. In my  
23 mind, there is no reason to question his credibility  
24 whatsoever.

11:34:48 25 Now, there were some comments by counsel for Fallon

1 that Dr. Roberts found the inner surfaces of the Fallon  
2 devices to be no different than the outer surfaces as far as  
3 reflectivity. I think if you will check his work that I  
4 called to your attention you will find just the opposite. He  
5 found a significant difference. He found the inner surfaces  
6 contributed greatly to the light that ultimately was emitted  
7 by the Fallon LED signs and that the outer surfaces had  
8 significantly less reflectivity.

11:35:18 9 And so I don't know the basis for that comment by  
10 Fallon's counsel, but it's not from Dr. Roberts' testimony.  
11 His slides are there as part of his report. You can check  
12 that for yourself.

11:35:39 13 Now, also you saw some snippets of Dr. Roberts'  
14 testimony. He was asked about certain words, not the entirety  
15 of the claims. Of course, it's the claims as a whole that you  
16 have to base your decisions on. And that was never put before  
17 him.

11:35:55 18 And so some of these snippets, is this here, is this  
19 here, is this here, are not the issue. The issue is: Are the  
20 claims as a whole anticipated on their obviousness defense, on  
21 their invalidity defense either anticipated or obvious. Not  
22 individual words.

11:36:16 23 Finally, -- that's a good word -- Fallon, the  
24 infringer's burden, as I said before, is clear and convincing  
25 evidence on this invalidity defense. Now, what does that

1 mean? That means that if you get back in that jury room and  
2 start talking and you start scratching your head, and if it  
3 wasn't clear, and if you are not convinced, that's not your  
4 fault. It's Fallon's burden to provide clear and convincing  
5 evidence on its invalidity defenses. And candidly, we think  
6 that burden has not been met. Thank you.

11:36:55 7 THE COURT: Ladies and gentlemen of the jury, we're  
8 going to take about a five minute recess and discuss whether  
9 the Court will give its instructions now or whether you all  
10 want to break for lunch and then come back and receive the  
11 Court's instructions.

11:37:18 12 The Court's instructions will take about a hour or so  
13 to read. So I'll let you all decide whether you want to hear  
14 those instructions now or whether you want to come back at  
15 about 12:30 and receive those Court's instructions. So we  
16 will take a brief recess in the back to allow you all to  
17 consider that, okay?

11:37:57 18 (Jury out.)

11:38:00 19 THE COURT: Don't you ever back door me again. I put  
20 the issue of whether you would be given an opportunity to  
21 speak as an issue I would decide. You put it before the jury.  
22 I consider that very improper. In fact, I'm going to have to  
23 explain it to the jury when they come back in. Don't ever do  
24 that again.

11:46:14 25 We're in recess.

11:46:47 1

(Recess.)

11:47:32 2

THE COURT: The note that I received from the Marshal  
3 from the jurors is:

11:47:35 4

We would like to go to lunch now.

11:47:39 5

If you will bring the jurors in, I'm going to give  
6 them the standard instruction. I'm also going to have to make  
7 a comment about this statement made by defense counsel.

11:48:10 8

(Jury in.)

11:48:12 9

THE COURT: Ladies and gentlemen of the jury, the  
10 Court is going to honor your request that you go to lunch now.  
11 When you come back, you will receive the Court's instruction.  
12 But before I do that, there are two things I want to go over  
13 with you.

11:48:26 14

Number one, you heard a reference at the end of  
15 defense counsel's closing argument that he may or may not get  
16 an additional opportunity to address you. The Court feels it  
17 is necessary to explain to you the process.

11:48:39 18

In this case and in normal cases, the plaintiff has  
19 the burden of proof. Therefore, in closing arguments, the  
20 plaintiff gets the opportunity to address you, and then the  
21 defendant, and then the plaintiff finally gets the opportunity  
22 to address you, because the plaintiff has the burden of proof  
23 in the case.

11:48:56 24

In this case, there are certain defenses asserted by  
25 the defendant for which the defendant has the burden of proof.



11:49:02 1 So to ensure that the normal procedure works within the  
2 framework of this case, I required the plaintiffs to state in  
3 their opening statements what they would have said in response  
4 to the defendant's defense. So that when the defendant made  
5 his closing statement, he not only knew what the other side  
6 was going to say about his defenses, but he had the  
7 opportunity to both make a full explanation and a full  
8 response to any response to his defenses.

11:49:32 9 So the Court felt under that arrangement each side  
10 fairly had the opportunity to comment on what the other side  
11 had to say about their claims and defenses, so that they had a  
12 fair opportunity to comment. So the Court is convinced that  
13 everyone had the fair opportunity to comment on all of the  
14 claims and defenses in this case, so that you have heard all  
15 of the parties' views and are now in a position to deliberate.

11:49:58 16 The second thing is what I tell you every time you  
17 leave the jury room. Please do not discuss the evidence  
18 amongst yourselves until you receive the Court's instructions  
19 on this. Don't do anything concerning consideration of the  
20 evidence until you receive the Court's instructions, you are  
21 in the jury room, and you have selected a foreperson. At that  
22 point you may begin your jury deliberations.

11:50:19 23 But with that instruction, I'm going to let you go to  
24 lunch. If you will come back at -- let's just say 1:00.  
25 Okay? Thank you. You are free to go. You can give your note

1 pads to the Marshal. He will take custody of them until you  
2 return.

11:50:56 3 (Jury out.)

12:59:45 4 THE COURT: We're adjourned.

12:59:45 5 (Recess.)

12:59:51 6 THE COURT: One matter I need to take up. If you will  
7 turn to Page 19 of your jury instructions, the second  
8 paragraph, as to the legal issues the Court has construed or  
9 interpreted of the plaintiff's claims. I took out of that  
10 earlier version you had to include the following, because the  
11 following doesn't really appear until about four or five pages  
12 later. So it just didn't make sense to continue to have it  
13 there.

13:00:27 14 If there are no other matters, you may bring the jury  
15 in, Mr. Marshal.

13:00:30 16 (Jury in.)

13:01:11 17 THE COURT: Members of the jury, you have now heard  
18 all of the evidence in the case as well as the final arguments  
19 of the lawyers for the parties. It becomes my duty,  
20 therefore, to instruct you on the rules of law that you must  
21 follow in arriving at your own decision in the case.

13:01:17 22 In any jury trial there are, in effect, two judges.  
23 I'm one of the judges; the other is the jury. It is my duty  
24 to preside over the trial and to determine what testimony and  
25 evidence is relevant under the law for your consideration.

13:01:29 1 It is also my duty at end of the trial to instruct you on the  
2 law applicable to the case. You, as jurors, are judges of the  
3 facts. But in determining what actually happened in this  
4 case, that is, in reaching your decision as to the facts, it  
5 is your sworn duty to follow the law I am now in the process  
6 of defining for you.

13:01:43 7 Now, you must follow all of my instructions as a  
8 whole. You have no right to disregard or give special  
9 attention to any one instruction or to question the wisdom or  
10 correctness of any rule I may state to you. That is, you must  
11 not substitute or follow your own notion or opinion as to what  
12 law is or ought to be. It is your duty to apply law as I give  
13 it to you, regardless of the consequences.

13:02:09 14 By the same token, it is also your duty to base your  
15 verdict solely on the testimony and evidence in the case,  
16 without prejudice or sympathy. That was the promise you made  
17 and the oath you took before being accepted by the parties as  
18 jurors in this case, and they have the right to expect nothing  
19 less.

13:02:19 20 The attorneys for the parties in this lawsuit have  
21 quite properly referred to some of the governing rules of law  
22 in their arguments. If, however, any difference appears to  
23 you between the law as stated by counsel and that stated by  
24 the Court in these instructions, you are, of course, to be  
25 governed by the Court's instructions. You must apply the law

1 that I give to you to the facts of this case.

13:02:34 2 Remember that any statements, objections, or arguments  
3 made by the lawyers are not evidence in the case. The  
4 function of the lawyers is to point out those things that are  
5 most significant or most helpful to their side of the case,  
6 and in so doing, to call to your attention certain facts or  
7 inferences that might otherwise escape your notice. In the  
8 final analysis, however, it is your own recollection and  
9 interpretation of the evidence that controls in the case.  
10 what lawyers say is not binding upon you.

13:02:58 11 Also, during the course of the trial I occasionally  
12 make comments to the lawyers or ask questions of a witness or  
13 admonish a witness concerning the manner in which he or she  
14 should respond to the questions of counsel. Do not assume  
15 from anything I may have said or any questions I may have had  
16 that I have any opinion concerning any of the issues in this  
17 case. Except for my instructions to you on the law, you  
18 should disregard anything I may have said during the trial in  
19 arriving at your own findings as to the facts.

13:03:21 20 Evidence may be either direct or circumstantial or  
21 both. Direct evidence is that contained in the testimony of a  
22 witness to a fact, the knowledge of which the witness acquired  
23 through the witness's own senses. It is evidence that proves  
24 a fact or group of facts without an inference.

13:03:35 25 Circumstantial evidence or indirect evidence is

1 knowledge that which is inferred from known facts. In other  
2 words, it is a proof of a chain of circumstances that  
3 indicates the existence or nonexistence of certain other  
4 facts. It is not permissible to draw an inference from  
5 another inference. However, it is permissible to draw  
6 reasonable inferences from proven facts.

13:03:57 7 An inference is a deduction of fact that may logically  
8 and reasonably be drawn from another fact or group of facts  
9 established by the evidence. The fact or facts upon which  
10 you, the jury, base an inference must be proved and not left  
11 to rest in conjecture, and when proved, it must appear that  
12 the inference drawn is more probable than any other  
13 explanation.

13:04:15 14 So, while you should consider only the evidence in the  
15 case, you are permitted to draw such reasonable inferences  
16 from the testimony and exhibits as you feel are justified in  
17 light of common experience. In other words, you may make  
18 deductions and reach conclusions which reason and common sense  
19 lead you to draw from the facts which have been established by  
20 the testimony and evidence in the case.

13:04:35 21 The law makes no distinction between direct and  
22 circumstantial evidence as to the degree of proof required.  
23 Each is accepted as a reasonable method of proof, and each is  
24 respected for such convincing force as it may carry.

13:04:46 25 Now that I have said you must consider all of the

1 evidence, this does not mean, however, that you must accept  
2 all the evidence as true or accurate. You are the sole judges  
3 of the credibility or believability of each witness and the  
4 weight to be given to the witness's testimony.

13:05:04 5 In weighing the testimony of a witness, you should  
6 consider the witness's relationship to the parties; the  
7 witness's interest, if any, in the outcome of the case; the  
8 witness's manner of testifying; the witness's opportunity to  
9 observe or acquire knowledge concerning the facts about which  
10 the witness testified; the witness's candor, fairness and  
11 intelligence; and the extent to which the witness has been  
12 supported or contradicted by other credible evidence. You  
13 may, in short, accept or reject the testimony of any witness  
14 in whole or in part.

13:05:26 15 Inconsistencies or discrepancies in the testimony of a  
16 witness, or between the testimony of different witnesses, may  
17 or may not cause the jury to discredit such testimony. Two or  
18 more persons witnessing an incident or a transaction may see  
19 or hear it differently; and innocent misrecollection, like  
20 failure of recollection, is not an uncommon experience.

13:05:46 21 A witness may be discredited by contradictory  
22 evidence, by a showing that the witness testified falsely  
23 concerning a material matter, or by evidence that at some  
24 other time the witness said or did something or failed to see  
25 or do something which is inconsistent with the witness's

1 present testimony. If you believe any witness has been so  
2 impeached, then it is within your exclusive province to give  
3 the testimony of that witness such credibility or weight, if  
4 any, that you may think it deserves.

13:06:06 5 In weighing the effect of a discrepancy, always  
6 consider whether it pertains to a matter of importance or an  
7 unimportant detail and whether the discrepancy results from  
8 innocent error or intentional falsehood.

13:06:20 9 You are not required to accept testimony, even though  
10 the testimony is uncontradicted and the witness is not  
11 impeached. You may decide, because of the witness's  
12 appearance, bearing and demeanor, or because of the inherent  
13 improbability of the witness's testimony, or for other reasons  
14 sufficient to you, that such testimony is not worthy of  
15 belief.

13:06:33 16 The weight of the evidence is not necessarily  
17 determined by the number of witnesses testifying as to the  
18 existence or nonexistence of any fact. You may find the  
19 testimony of a smaller number of witnesses as to any fact is  
20 more credible than the testimony of a larger number of  
21 witnesses to the contrary.

13:06:52 22 The law does not require any party to call as  
23 witnesses all persons who may have been present at any time or  
24 place involved in the case, and who may appear to have some  
25 knowledge of the matters in issue at this trial. Nor does the

1 law require any party to produce as exhibits all papers and  
2 things mentioned in the evidence in the case.

13:07:08 3 A person who begins a lawsuit is called a plaintiff.  
4 A plaintiff always seeks some kind of relief against the other  
5 party, called the defendant.

13:07:14 6 In order to be entitled to the relief it seeks, the  
7 plaintiff in this case is required to prove its case by a  
8 preponderance of the evidence; that is, by the greater weight  
9 of the evidence. It is said, therefore, that the burden of  
10 proof is upon the plaintiff. This broad, general burden  
11 continues upon the plaintiff, and he must maintain it in order  
12 to be entitled to a verdict.

13:07:31 13 When a lawsuit is brought by a plaintiff against a  
14 defendant, the defendant may simply deny that he was at fault.  
15 The burden of proof is not upon the defendant to prove that it  
16 was not at fault, but rather, it is up to the plaintiff to  
17 prove that the defendant was at fault, and because of the  
18 defendant's wrongful conduct, the plaintiff sustained damages.

19 In other words, after the plaintiff has presented  
20 evidence tending to establish the elements of his claim, the  
21 defendant may simply deny he was at fault and confine the  
22 evidence presented to evidence which tends to rebut or  
23 disprove the elements of the plaintiff's claims.

13:08:01 24 Yet, whereas here the defendant relies upon the  
25 defenses of invalidity and obviousness, the defendant bears



1 the burden of proof to prove by a clear and convincing  
2 evidence that the claims of the plaintiff's patents are  
3 obvious or otherwise invalid.

13:08:16 4 where the burden of proof rests upon a particular  
5 party, that party is required to prove his claim by a  
6 preponderance of the evidence. Preponderance means the  
7 greater weight of the evidence. The plaintiff, who is  
8 required to make out his case substantially as alleged, must  
9 meet its obligation with the greater weight of the evidence.  
10 The balance of the scales must be tipped in his favor. If the  
11 evidence swings to the balance to the defendant's side, the  
12 plaintiff must fail. Also, if the scales are in an even state  
13 of balance, the plaintiff must fail, because in that event the  
14 parties are in same situation before they started.

13:08:50 15 However, the defendant, to prove its defenses, has the  
16 burden of beyond -- of clear and convincing evidence. The  
17 legal effect of the defendants' denial and theory is to deny  
18 each and every material allegation of the plaintiff and to  
19 cast the burden of proof upon the plaintiff, who must prove  
20 its case by a preponderance of the evidence before any  
21 recovery can be had in favor of the plaintiff, though a bare  
22 preponderance of the evidence, however slight, will be  
23 sufficient to entitle the plaintiff to recover.

13:09:15 24 In common, everyday language, what I have just stated  
25 to you simply means that where the plaintiff iLight has the

1 burden of proof, iLight must prove its affirmative theory of  
2 infringement of its patents to your satisfaction by a  
3 preponderance of the evidence; that is, that something is more  
4 likely to have occurred than not.

13:09:32 5 The defendant Fallon has the burden of proof of its  
6 defenses of invalidity and obviousness by a clear and  
7 convincing evidence standard. That is, based upon the  
8 evidence presented in this case, you must be left with a clear  
9 conviction that the claim is not new.

13:09:44 10 You have heard testimony in the form of opinions. The  
11 rules of evidence ordinarily do not permit witnesses to  
12 testify as to opinions or conclusions. Lay persons may give  
13 opinions where the Court determines such opinions may be of  
14 aid to the jury.

13:09:56 15 Given the subject matter of this dispute, the Court  
16 deemed it helpful to aid in your evaluating the evidence to  
17 hear some of the opinions of lay persons who are knowledgeable  
18 about the subject of this lawsuit.

13:10:07 19 You should consider each witness's opinion received in  
20 evidence in the case, and give it such weight as you may think  
21 it deserves. If you should decide the opinion of any witness  
22 is not based upon sufficient experience, or if you should  
23 conclude that the reasons given in support of the opinion are  
24 not sound, or that opinion is outweighed by other evidence,  
25 you may disregard the opinion entirely.

13:10:27 1           An expert witness is one who possesses special or  
2       technical knowledge or skill upon the subject about which the  
3       expert testifies. That is, upon a subject with which ordinary  
4       people are not familiar. An expert differs from the ordinary  
5       witness in that the expert is permitted to express opinions as  
6       to the results of proven facts, although the expert may also  
7       testify as to facts themselves, as any other witness.

13:10:48 8           Expert opinions are not to be accepted as facts.  
9       Those opinions should be carefully weighed by the jury with  
10      regard to the expert's education, training, experience and  
11      sources of knowledge, as well as with regard to that expert's  
12      prejudices, if any appear.

13:11:03 13          Expert witnesses are frequently paid special  
14      compensation by the party on whose behalf they testify. Such  
15      compensation is entirely proper. Yet, because of it, the jury  
16      should receive the expert's testimony with caution and weigh  
17      it carefully.

13:11:18 18          Certain testimony has been read into evidence from a  
19      deposition. A deposition is testimony taken under oath before  
20      trial and preserved in writing. You are to consider that  
21      testimony as if it had been given in court.

13:11:26 22          As I did at the start of the case, I will first give  
23      you a summary of each side's contentions in this case. I will  
24      then provide you with detailed instructions on what each side  
25      must prove to win on each of its contentions. As I previously

1 told you, iLight seeks money damages from Fallon for allegedly  
2 infringing the patents in this lawsuit by making, importing,  
3 using, selling, and offering for sale products that iLight  
4 argues are covered by Claims 8 and 25 of the '238 Patent,  
5 Claims 1 and 8 of the '262 Patent, and Claims 1, 5 and 8 of  
6 the '970 Patent. These are the asserted claims of the patents  
7 in this lawsuit. The products that are alleged to infringe  
8 are Fallon's LED signs.

13:12:07 9 Fallon denies that it has infringed the asserted  
10 claims of the patents and argues that, in addition, Claims 8  
11 and 25 of the '238 Patent, Claims 1 and 8 of the '262 Patent,  
12 and Claims 1, 5 and 8 of the '970 Patent are invalid.

13:12:25 13 Your job is to decide whether Fallon has infringed the  
14 asserted claims of the patents-in-suit and whether any of  
15 these asserted claims in the patents-in-suit are invalid. If  
16 you decide any claim of the patent has been infringed and is  
17 not invalid, you will then need to decide any money damages to  
18 be awarded to iLight to compensate it for the infringement.  
19 You will also need to make a finding as to whether the  
20 infringement was willful. If you decide any infringement was  
21 willful, that decision should not affect any damage awards you  
22 make. I will take willfulness into account later.

13:12:53 23 This case involves a dispute relating to three United  
24 States patents owned by the plaintiff iLight. A summary of  
25 the earlier descriptions of patents and the patent process may

1 be helpful. Patents are granted by the Patent Office. A  
2 valid United States patent gives iLight the right for up to 20  
3 years from the date the patent application was filed to  
4 prevent others from making, using, offering to sell, or  
5 selling the patented invention within the United States, or  
6 from importing it into the United States without iLight's  
7 permission. A violation of iLight's rights is called  
8 patent infringement. iLight may enforce its patents against  
9 persons believed to be infringers by filing a lawsuit in  
10 federal court.

13:13:32 11 The process of obtaining a patent is called patent  
12 prosecution. To obtain a patent requires an application filed  
13 with the Patent Office. The Patent Office is an agency of the  
14 federal government and employs trained examiners who review  
15 applications for patents. The application includes what is  
16 called a specification that must contain a written description  
17 of the claimed invention describing the invention, how it  
18 works, how to make it, how to use it, so others skilled in the  
19 field will know how to make it or use it. The specification  
20 concludes with one or more numbered sentences. These are the  
21 patent claims. When the patent is eventually granted by the  
22 Patent Office, the claims define the boundaries of the  
23 patent's protection and give notice to the public of those  
24 boundaries.

13:14:16 25 After the applicant files the application, the Patent

1 Office patent examiner reviews the application to determine  
2 whether the claims are patentable, that is, appropriate for  
3 patent protection, and whether the specification adequately  
4 describes the invention claimed.

13:14:33 5 In examining a patent application, the patent examiner  
6 reviews records available to the Patent Office or submitted by  
7 the applicant for what is referred to as prior art. The  
8 examiner reviews this prior art to determine whether the  
9 invention is truly an advance over the state of the art at the  
10 time. That is, whether each claim defines an invention that  
11 is new and not obvious in view of the prior art.

13:14:59 12 Prior art is defined by law that will be described  
13 later in detail, but in general, prior art includes any  
14 subject matter that existed before the claimed invention. A  
15 patent lists the prior art that the examiner considered, and  
16 that list is called the cited references.

13:15:14 17 After the prior art search and examination of the  
18 application, the patent examiner informs the applicant in  
19 writing of what the examiner has found and whether the  
20 examiner considers any claim to be patentable, and, thus,  
21 would be, quote, allowed. This writing from the patent  
22 officer is called an office action. If the examiner rejects  
23 the claims, the applicant has an opportunity to respond to the  
24 examiner and to change the claims or to submit new claims.

13:15:42 25 This process may go back and forth for some time until the

1 examiner is satisfied whether the application meets the  
2 requirements for a patent. The papers generated during these  
3 communications between the patent examiner and the applicant  
4 are called the prosecution history.

13:15:49 5 The fact that the Patent Office grants a patent does  
6 not necessarily mean that any invention claimed in the patent,  
7 in fact, deserves the protection of a patent. For example,  
8 the Patent Office may not have had available to it all the  
9 other prior art that will be presented to you. A person  
10 accused of infringement has the right to argue in federal  
11 court that a claimed invention in the patent is invalid  
12 because it does not meet the requirements for a patent. The  
13 jury must consider the evidence presented by the parties and  
14 determine independently whether Fallon has proved that  
15 iLight's patents are invalid.

13:16:24 16 The cover page of each of iLight's patents identifies  
17 the date the patent was granted and the patent number along  
18 the top, as well as the inventor's name, the filing date, and  
19 a list of references considered in the Patent Office. The  
20 plaintiff's patents at issue in this case are U.S. Patent  
21 Number 6,592,238, the '238 Patent, issued July 15, 2003; the  
22 U.S. Patent Number 6,952,262, or the '262 Patent, issued  
23 October 11, 2005; and U.S. Patent 7,188,970, the '970 Patent,  
24 issued March 13, 2007. The usual practice at trial is to  
25 refer to the patents by the last three numbers of the patent.

1           Now, the specification of the patent begins with an  
2     abstract, also found on the cover page. The abstract is a  
3     brief statement about the subject matter of the patent. Next  
4     come the drawings that illustrate various aspects or features  
5     of the invention. The written description of the invention  
6     appears next and is organized into two numbered columns on  
7     each page. The written description includes a background of  
8     the invention, the summary of the present invention, the  
9     description of the drawings, and a detailed description of the  
10    invention. The specification ends with numbered paragraphs.  
11    These are the patent claims.

13:17:38 12           I have already determined the meaning of iLight's  
13    claims in its three patents that are at issue in this lawsuit.  
14    For those words in the claim for which I have not provided you  
15    with a definition, you should apply their plain English  
16    meaning. You are to apply my definitions of these terms  
17    throughout the case. However, my interpretation of the  
18    language of the claims should not be taken as any indication  
19    that I have one view on the issues of infringement and  
20    invalidity. You, the jury, must decide the issues of  
21    infringement and invalidity as defined in these instructions.

22           Ladies and gentlemen of the jury, as stated to you  
23    earlier, the questions or issues in this case are two-fold.  
24    The first issue is a legal issue for the Court to determine,  
25    namely, the meaning of the claims of the plaintiff's patents



1 that are entitled to legal protection under the patent laws.  
2 The second set of questions is for the jury's determination of  
3 whether the defendant's product infringes upon the asserted  
4 claims of the plaintiff's patent.

13:18:29 5 As to the legal issues, the Court has construed and  
6 interpreted the plaintiff's patent's claims.

13:18:35 7 The patent claims are the numbered sentences at the  
8 end of each patent. These claims are important, because the  
9 claims define what a patent covers. The figures and text in  
10 the rest of the patent provide a description and/or examples  
11 of the invention, and provide a context for the claims. But  
12 the claims define how broad or narrow the patent's coverage  
13 is.

13:18:55 14 Each claim is effectively treated as if it were a  
15 separate patent, and each claim may cover more or less than  
16 another claim. Therefore, what a patent covers depends, in  
17 turn, on what each of its claims covers.

13:19:08 18 As a matter of law, each and every claim of a patent  
19 is presumed valid, and this presumption of validity exists at  
20 every stage of the litigation until such time, if ever, you  
21 find the defendant has shown, by clear and convincing  
22 evidence, that the patent is invalid.

13:19:20 23 A claim sets forth, in words, a set of requirements.  
24 Each claim sets forth its requirements in a single sentence.  
25 If a device or method satisfies each of the requirements, then

1 it is covered by the claim. There can be several claims in a  
2 patent. Each claim may be narrower or broader than another  
3 claim by setting forth more or less requirements. The  
4 coverage of a patent is assessed claim by claim. To decide  
5 whether any infringement of the claim or to decide whether the  
6 claim is invalid, you must apply the definitions in these  
7 instructions. You must accept my definitions of these words  
8 in the claims as correct. You must take these definitions and  
9 apply them to decide the issues of infringe and invalidity.

13:20:03 10 In patent law, the requirements of a claim are often  
11 referred to as, quote, claim elements, or, quote, claim  
12 limitations. When a product meets all the requirements of the  
13 claim, the claim is said to cover that product, and that  
14 product is construed to fall within the scope of that claim.  
15 In other words, a claim covers a product where each of the  
16 claim's elements or limitations is present in that product.

17 For example, a claim that reads: "A product  
18 comprising of a seat and legs" covers all products that have  
19 both a seat and legs. The word "comprising" in this claim is  
20 a special word in patent law, meaning that the claim covers  
21 all products that have a seat and legs, regardless of whether  
22 or not they also have additional features.

13:20:44 23 For example, this claim would cover several different  
24 kind of chairs, stools and sofas, because there are several  
25 kinds of different chairs, stools and sofas that have at least

1 a seat and legs. By understanding the meaning of the words in  
2 the claims, and by understanding that the words in a claim set  
3 forth the requirements that must be met to be covered by that  
4 claim, you will be able to determine the scope of each claim.  
5 Once you determine the scope of each claim, then you decide if  
6 the defendant's product infringe plaintiff's patents and  
7 whether plaintiff's patents are invalid.

13:21:20 8 This case involves two types of patent claims:  
9 Independent claims and dependent claims. And independent  
10 claim sets forth all the requirements that must be met to be  
11 covered by that claim. For an independent claim, you not need  
12 to look at any other claim to determine what an independent  
13 claim covers.

13:21:36 14 In this case, the Court instruct you that Claims 8 and  
15 25 of iLight's '238 Patent, Claim 1 of iLight's '262 Patent,  
16 and Claims 1, 5 and 8 of iLight's '970 Patent, of the patents  
17 in this lawsuit are each independent claims.

13:22:00 18 The Court instructs you that Claim 8 of iLight's '260  
19 patent is a dependent claim. A dependent claim does not  
20 recite all of the requirements of the claim, but refers to  
21 another claim for some of its requirement. In this way, the  
22 claim depends upon on another claim. The law considers a  
23 dependent claim to incorporate all the requirements of the  
24 claim to which it refers. The dependent claim then adds its  
25 own additional requirements.

13:22:25 1 To determine what a dependent claim covers, you must  
2 examine both the dependent claim and any other claim to which  
3 it refers. A product that meets all the requirements of both  
4 the dependent claim and the claim to which refers is covered  
5 by that dependent claim.

13:22:48 6 The Court has construed or interpreted the plaintiff's  
7 patents to include the following claims that are protected by  
8 patent. The relevant claims for your consideration in this  
9 case are as follows:

13:22:55 10 The '238 Patent.

13:22:59 11 Claim 8. An illumination device for simulating neon  
12 light comprising:

13:23:02 13 A substantially rod-like member having a predetermined  
14 length with a lateral light receiving surface and lateral  
15 curved light emitting surface having a predetermined  
16 circumferential width, said member being comprised of a  
17 material that has both optical waveguide and light scattering  
18 properties that preferentially scatters light entering said  
19 light receiving surface into an elongated light intensity  
20 pattern on said light emitting surface with a major axis  
21 extending along said predetermined length;

13:23:41 22 An elongated light source extending along and  
23 positioned adjacent said light receiving surface and spaced  
24 from said light emitting surface a sufficient distance to  
25 allow said light intensity pattern on said emitting surface to

1 have a minor axis extending substantially the entire  
2 circumstantial width of said light emitting surface;

13:24:03 3 A housing in which said light source is positioned;  
4 said housing extending along said light receiving surface, and  
5 having a pair of sidewalls, each with an interior light  
6 reflecting surface and an exterior light absorbing surface;  
7 and

13:24:14 8 Electric connecting member positioned within said  
9 housing and adapted to connect said light source to a remote  
10 power source.

13:24:25 11 Claim 25. An illumination device for simulating neon  
12 lighting, comprising:

13:24:33 13 A light transmitting member of a predetermined length  
14 having a substantially curved front surface and a light  
15 receiving lateral surface, said member being comprised of a  
16 material that has both optical waveguide and light scattering  
17 properties that preferentially scatters light entering said  
18 light receiving surface into an elongated light intensity  
19 pattern on said light emitting surface with a major axis  
20 extending along said predetermined length;

13:24:55 21 A housing having spaced sidewalls abutting said light  
22 receiving later surface and defining a volume extending along  
23 predetermined length of said light transmitting member, said  
24 sidewalls having light reflecting interior surfaces and light  
25 absorbing exterior surfaces; and

13:25:11 1 A multiplicity of spaced point light sources housed  
2 within said volume and extending along said predetermined  
3 length, said spaced point light sources positioned a distance  
4 from said curved front surface sufficient to allow a light  
5 intensity pattern from each of said point light sources to  
6 overlap neighboring light intensity patterns so that the light  
7 intensity pattern collectively emitted from said front surface  
8 appears uniform.

13:25:42 9 The '262 Patent.

13:25:46 10 Claim 1. An illumination device for simulating neon  
11 lighting, comprising:

13:25:53 12 An essentially solid leaky waveguide rod having a  
13 predetermined length with a lateral light receiving surface  
14 and a lateral light emitting surface;

13:26:04 15 An elongated light source extending substantially  
16 along said predetermined length of and positioned adjacent to  
17 said light receiving surface for emitting a portion of light  
18 emitted by said light source directly into said light source  
19 receiving surface; and

13:26:24 20 A housing positioned externally and adjacent to said  
21 waveguide rod and defining a volume that encompasses said  
22 elongated light source, whereby said housing includes  
23 sidewalls, having internally light reflecting surfaces and  
24 serves to collect and direct light emitted by such light  
25 source into said lateral light receiving surface such that

1 light is preferentially directed along the predetermined  
13:26:43 2 length of the leaky waveguide rod, exiting said light emitting  
3 surface in an elongated light intensity pattern that has a  
4 major axis extending along the length of said waveguide rod.

13:26:57 5 Claim 8. The illumination device of Claim 1 in which  
6 said sidewalls have externally light absorbing surfaces.

13:27:03 7 The '970 Patent.

13:27:05 8 Claim 1. An illumination device comprising:

13:27:12 9 A rod-like member having a predetermined length and a  
10 curved light emitting surface;

13:27:15 11 An elongated light source extending substantially  
12 along the predetermined length of said rod-like member at a  
13 fixed distance from said light emitting surface; and

13:27:26 14 A housing for said elongated light source, said  
15 housing including opposing and substantially parallel  
16 sidewalls with internally light reflecting surfaces such that  
17 said housing serves to collect and direct light emitted by  
18 said light source into said rod-like member, with such light  
19 then passing through and being scattered by said rod-like  
20 member so as to exit the curved light emitting surface in a  
21 substantially uniform light intensity pattern.

13:27:56 22 Claim 5. An illumination device comprising:

13:28:00 23 An essentially solid leaky waveguide rod having a  
24 predetermined length and a curved light emitting surface;

13:28:08 25 An elongated light source extending substantially

1 along the predetermined length of said waveguide rod at a  
2 fixed distance from said light emitting surface; and

13:28:15 3 Opposing and substantially parallel sidewalls  
4 positioned on either side of the light source, each having  
5 internally light reflecting surfaces that serve to collect and  
6 direct light emitted by said light source into said waveguide  
7 rod, with such light then passing through and being scattered  
8 by said waveguide rod so as to exit the curved light emitting  
9 surface in a substantially uniform light intensity pattern.

10 Claim 8. An illumination device for simulating neon  
11 lighting, comprising:

13:28:41 12 A rod-like member having a predetermined length and a  
13 curved light emitting surface. An elongated light source  
14 extending substantially along the predetermined length of said  
15 rod-like member at a fixed distance from said light emitting  
16 surface; and

13:28:57 17 A housing for said elongated light source, said  
18 housing including opposing and substantially parallel  
19 sidewalls with internally light reflective surfaces such that  
20 said housing serves to collect and direct light emitted by  
21 said light source into said rod-like member, with such light  
22 then passing through and being scattered by said rod-like  
23 member into a light intensity pattern that is perceived as  
24 being substantially uniform over the curved light emitting  
25 surface, irrespective of viewing angle, so as to simulate neon



1 lighting.

13:29:26 2 Now, you must accept my definition of these words in  
3 these claims as correct. You should not take my definition of  
4 the language of the claims as an indication that I have a view  
5 regarding how you should decide those issues that you are  
6 being asked to decide such as infringement and invalidity.  
7 Those issues are for you to decide.

13:29:48 8 Now, the plaintiff's claimed invention is a, quote,  
9 illuminating device for simulating neon lighting that is a  
10 lighting device with low voltage lighting sources that uses  
11 electricity to produce lighting with high intensity nearly  
12 evenly or uniformly distributed and in appearance is close to  
13 a neon gas light. This device can be made into different  
14 shapes without breaking and is used mostly for commercial  
15 signage and advertising. This device does not use neon gas,  
16 but includes a rod and rod-like substance through which light  
17 passes, producing an even glow throughout its entire length  
18 and the radial circumference, regardless of the viewing angle.  
19 This device uses a material with waveguide characteristics. A  
20 waveguide is material that transmits and channels light waves  
21 through the device.

13:30:33 22 The term "rod" means a slender strip or slender bar  
23 resembling in shape a wand.

13:30:41 24 The term "rod-like" means a slender bar like a rod.

25 The term "preferentially scatters light" means light

1 produced that has a higher desirability or offers an advantage  
2 of light spread over a wide area throughout the interior and  
3 exterior areas of the rod or rod-like device.

13:30:59 4 The term "interior light reflecting surfaces" means  
5 the material of the interior walls of the housing of the  
6 device that transmits the light waves in a favorable manner so  
7 as to send the light waves to the exterior.

13:31:15 8 The term "exterior light absorbing surfaces" means the  
9 material on the outside of the housing of the device that  
10 absorbs the light in favorable manner so as to maximize the  
11 appearance of light on the exterior.

13:31:29 12 The term "substantially parallel" means that the  
13 interior walls of the housing of the device extend in the same  
14 direction and close approximation everywhere so as to be  
15 equidistant, thereby forming lines in the same direction but  
16 not meeting. The materials come close to or resemble parallel  
17 lines, with each sharing essential qualities or  
18 characteristics.

13:31:47 19 I will now instruct you on how to decide whether  
20 Fallon has infringed iLight's patents. Infringement is  
21 assessed on a claim-by-claim basis. Therefore, there may be  
22 an infringement as to one claim but not infringement as to  
23 another.

13:32:01 24 Here, iLight alleges that Fallon directly infringes  
25 the patents. iLight also alleges that Fallon is liable for

1 infringement through importation and sale of an infringing  
2 product.

13:32:13 3 Plaintiff asserts claims for direct or literal  
4 infringement.

13:32:17 5 A company directly or literally infringes a claim if,  
6 during the time the patent is in force, the company makes,  
7 uses, sells or offers to sell within, or imports into the  
8 United States a product that meets all of the requirements of  
9 the claim and does so without the permission of iLight.

13:32:28 10 To determine whether a particular product meets all of  
11 the requirements of a claim, you must apply the meaning of the  
12 words in the disputed claims as I explained them to you.  
13 Other words in the claims should be given their plain English  
14 meaning.

13:32:41 15 You must compare the product with each and every one  
16 of the requirements of the claim to determine whether all the  
17 requirements of the claim are met.

13:32:47 18 When the product meets all of the requirements of the  
19 claim, the product is said to literally infringe that claim.  
20 If a product that literally infringes a claim is made, used,  
21 sold, offered for sale within, or imported into the United  
22 States during the time the patent is in force, without  
23 iLight's authorization, then Fallon directly infringed that  
24 claim.

13:33:07 25 To prove direct infringement by literal infringement,

1 iLight must prove that the above requirements are met by a  
2 preponderance of the evidence. That is, that it is more  
3 likely than not that Fallon made, used, sold, offered for sale  
4 within, or imported into the United States, without iLight's  
5 permission, during the time the patent is in force, a product  
6 that meets all of the requirements of a claim. The whole  
7 product need not infringe. Thus, if only a part of a product  
8 meets all of the requirements of a claim, the product is an  
9 infringing product.

13:33:40 10 You must determine, separately, for each of the  
11 asserted claims, whether Fallon's product infringed iLight's  
12 patent rights. However, as I have explained to you, a  
13 dependent claim includes all of the requirements of any of the  
14 claims to which it refers, plus additional requirements of its  
15 own. Therefore, if you should find that an independent claim  
16 is not infringed directly or literally, then you must also  
17 find that any claim that depends upon the independent claim  
18 also does not infringe.

13:34:06 19 On the other hand, if you find that an independent  
20 claim has been infringed, you must still decide separately  
21 whether the additional requirements of any claims that depend  
22 upon the independent claim have also been infringed.

13:34:21 23 In this case, iLight argues both that Fallon infringed  
24 and, further, that Fallon infringed willfully. Even if you  
25 decide that Fallon has infringed, you must then address the

1 additional issue of whether Fallon's infringement was willful.

2 Willfulness requires proof by clear and convincing evidence:

3 1. That Fallon was aware of the patent in question;

4 2. That Fallon acted despite an objectively high  
5 likelihood that Fallon knew its acts infringed on iLight's  
6 valid patent; and

13:34:55 7 3. This objectively high risk was either known or so  
8 obvious that it should have been known.

13:34:59 9 To prove willful infringement, iLight must establish  
10 that Fallon willfully infringed any of its patents, and  
11 iLight's proof of willfulness must leave you with a clear  
12 conviction that the infringement was willful.

13:35:12 13 In deciding whether Fallon committed willful  
14 infringement, you must consider all of the facts, which  
15 include but are not limited to:

13:35:18 16 1. whether Fallon intentionally copied a product  
17 of iLight that is covered by the patent in question;

13:35:23 18 2. whether Fallon possessed a reasonable basis to  
19 believe that it had a substantial defense to infringement and  
20 reasonably believed that the defense would be successful if  
21 litigated;

13:35:35 22 3. whether Fallon made a good faith effort to  
23 avoid infringing the patent; for example, Fallon took remedial  
24 action upon learning of the patent by ceasing infringing  
25 activity or attempting to design and around the patent; and

1           4.       whether Fallon tried cover up its alleged  
2   infringement.

13:35:57 3           You must decide whether Fallon has proven that the  
4   claims of the particular iLight patent in question are  
5   invalid. To prove that any claim of a patent is invalid,  
6   Fallon must persuade you by clear and convincing evidence.  
7   That is, in order to find a claim invalid, you must be left  
8   with a clear conviction that the claim is invalid. As a  
9   matter of law, each and every claim of a patent is presumed  
10   valid, and this presumption of validity exists at every stage  
11   of the litigation, until such time, if ever, you find that the  
12   defendant has shown by clear and convincing evidence that the  
13   patent is invalid.

13:36:33 14          Fallon's invalidity defense is based upon the  
15   doctrines of anticipation, obviousness and indefiniteness.

16          Fallon may establish that a patent claim is invalid by  
17   showing, by clear and convincing evidence, that the claimed  
18   invention is not new. For the claim to be invalid because it  
19   is not new, Fallon must show that all of the requirements of  
20   that claim are present in a single previous device or method,  
21   or described in a single previous printed publication or  
22   patent. We call these things "prior art". The description in  
23   a reference does not have to be in the same words as the  
24   claim, but all of the requirements of the claim must be there,  
25   either stated expressly or necessarily implied or inherent in

1 the level or ordinary skill in the art in the technology of  
2 the invention at the time of the invention so that someone of  
3 ordinary skill in the field of technology of the patent  
4 looking at that one reference would be able to make and use  
5 the claimed invention.

13:37:23 6 Here is a list of ways that Fallon can show the patent  
7 was not new:

13:37:26 8 If the claimed invention was known or used by others  
9 in the United States before the invention was made by the  
10 inventor, in this case January 31, 2001;

13:37:35 11 If the claimed invention was patented or described in  
12 a printed publication anywhere in the world before the  
13 invention was made by the inventor, in this case January 31,  
14 2001;

13:37:47 15 If the claimed invention was patented and described in  
16 a printed publication anywhere the world more than a year  
17 before January 31, 2001;

13:37:56 18 If the claimed invention was in public use or on sale  
19 in the United States before January 31, 2001;

13:38:02 20 If the claimed invention was patented or a patent  
21 application was filed in a foreign country more than one year  
22 before January 31, 2001;

13:38:10 23 If the claimed invention was described in a published  
24 patent application filed by another in the United States or  
25 was filed with the world Intellectual Property Organization

1 after November 29, 2000, designated by the United States, and  
2 was published in English before the invention was made by the  
3 inventor, in this case January 31, 2001;

13:38:36 4 If the claimed invention was described in a patent  
5 granted on an application for a patent by another filed in the  
6 United States, or was filed with the World Intellectual  
7 Property Organization after November 29, 2000, designated in  
8 the United States, and was published in English before the  
9 invention was made by the inventor, in this case January 31,  
10 2001;

13:38:55 11 If the claimed invention was made by someone else in  
12 the United States before the invention was made by the  
13 inventor, in this case January 31, 2001, and the other person  
14 had not abandoned the invention, kept it secret, or took steps  
15 to prevent information about the invention from being revealed  
16 to others.

13:39:12 17 To establish that the claimed invention is invalid for  
18 any of the above reasons, Fallon must establish by clear and  
19 convincing evidence that the invention is not new. That is,  
20 based upon the evidence presented in this case, you must be  
21 left with a clear conviction that the claim is not new.

13:39:31 22 In determining whether a single item of prior art  
23 anticipates a patent claim, you should take into consideration  
24 not only what is expressly disclosed in a particular item of  
25 prior art, but also what inherently resulted from its



1 practice. This is called inherency. A party claiming  
2 inherency must prove it by clear and convincing evidence.

3 Inherency requires a determination of the meaning of  
4 the prior art. To establish inherency, the evidence must make  
5 clear that the missing descriptive matter is necessarily  
6 present in the thing described in the prior art reference.

13:40:00 7 By necessarily present I mean the presence of the missing  
8 descriptive matter is logically required based on  
9 circumstances that would be understood by one of ordinary  
10 skill in the art. It is not required, however, that the  
11 person of ordinary skill would have recognized the inherent  
12 disclosure in the prior art either at the time the prior art  
13 was created or before the date on which the invention was  
14 available for sale, described in a publication, or in public  
15 or commercial use.

13:40:27 16 The fact that a characteristic is a necessary feature  
17 or a result of a prior invention is enough to establish  
18 inherency, even if that fact were unknown at the time of the  
19 prior invention.

13:40:40 20 Obviousness. Even though an invention may not have  
21 been identically disclosed or described before it was made by  
22 an inventor, to be patentable, the invention must not have  
23 been obvious to a person of ordinary skill in the field of  
24 technology of the patent at the time the invention was made.

13:40:58 25 Fallon may establish that a patent claim is invalid by

1 showing by clear and convincing evidence that the claimed  
2 invention would have been obvious to persons of ordinary skill  
3 in the art at the time the invention was made. For the claim  
4 to be invalid because it would have been obvious, you must  
5 first evaluate the following factors:

- 13:41:17 6 1. what is the scope and content of the prior art;  
13:41:19 7 2. what are the differences, if any, between the  
8 inventions and the prior art;  
13:41:24 9 3. what was the level of ordinary skill in the art  
10 at the time the inventions were made; and  
13:41:29 11 4. what evidence is there, if any, of certain  
12 additional considerations relating to obviousness or  
13 nonobviousness of the inventions?

13:41:37 14 You must decide, in view of the evidence presented to  
15 you on these factors, whether iLight's inventions, considered  
16 as whole, would have been obvious to one having ordinary skill  
17 in the art at the time the inventions were made. You must  
18 make this determination separately for each of the inventions  
19 described in each of the claims.

13:41:52 20 Before doing so, however, you must keep in mind that  
21 it is not permissible to use hindsight in assessing whether  
22 the inventions are invalid for obviousness. You cannot look  
23 at the invention knowing what persons of ordinary skill in the  
24 art know today. Rather, you must place yourself in the shoes  
25 of a person having ordinary skill in the field of technology

1 of the patent at the time the inventions were made.

13:42:17 2 In this case, Fallon contends that the inventions are  
3 obvious in view of a combination of more than one prior art  
4 reference. In placing yourself in the shoes of a person  
5 having ordinary skill in the field of technology relevant to  
6 this case at the time the inventions were made, you may also  
7 consider whether such a person would have been motivated to  
8 combine these prior art references in order to arrive at the  
9 claimed inventions.

13:42:43 10 The first question you must answer in determining  
11 whether the invention was obvious is the scope and content of  
12 the prior art at the time the invention was made. You must  
13 decide whether specific references relied upon in this case  
14 are prior art to the inventions described in Claims 8 and 25  
15 of the '238 Patent, Claims 1 and 8 of the '262 Patent, and  
16 Claims 1, 5 and 8 of the '970 Patent.

13:43:06 17 Prior art include previous devices, articles and  
18 methods that were offered for sale, printed publications or  
19 patents that disclose the inventions or elements of the  
20 inventions. Once you decide whether specific references are  
21 prior art, you must also decide what those references would  
22 have disclosed or taught to one having ordinary skill in the  
23 field of technology of the patent at the time the inventions  
24 were made.

13:43:29 25 For a reference to be considered prior art, you must

1 find the reference was known, used, published or patented as  
2 appropriate to the particular reference, before the invention  
3 was made by the inventor, in this case before January 31,  
4 2001. Alternately, even if a reference was not known before  
5 the date of the invention, the reference is nonetheless prior  
6 art if the reference was known, used, published or patented  
7 more than one year before the filing of the application for  
8 the patents-in-suit.

13:43:54 9 For a reference to be relevant for you to consider in  
10 deciding whether iLight's claimed inventions would have been  
11 obvious, the reference must be within the field of the  
12 inventor's endeavor, or if it is from another field of  
13 endeavor, the reference must reasonably relate to particular  
14 problems or issues that the inventors faced or addressed when  
15 making the inventions described in Claims 8 and 25 of the '238  
16 Patent, Claims 1 and 8 of the '260 Patent, and Claims 1, 5 and  
17 8 of the '970 Patent.

13:44:28 18 A reference from a field of endeavor other than the  
19 inventor's is reasonably related to the problems or issues the  
20 inventors faced if the reference is one which, because of the  
21 matter with which the reference deals, logically would have  
22 committed itself to the attention of the inventors when  
23 considering the problems or issues they faced in this case.

24 You must decide what the problems or issues were that  
25 the inventors faced at the time the inventions in Claims 8 and

1 25 of the '238 Patent, Claims 1 and 8 of the '262 Patent, and  
2 Claims 1, 5 and 8 of the '970 Patent were made.

13:45:01

3 The second question you must answer in determining  
4 whether the inventions were obvious at the time they were made  
5 is what differences there are, if any, between the prior art  
6 and patented inventions. In analyzing this issue, do not  
7 focus solely on the differences between the prior art and  
8 inventions because the test is not whether there are  
9 differences. Rather, the test is whether each invention as a  
10 whole would have been obvious to one having ordinary skill in  
11 view of all the prior art at the time each invention was made.

12 The third question you must answer in determining  
13 whether the inventions were obvious at the time they were made  
14 is what was the level of ordinary skill in the field at the  
15 time. ILight contends that the level of ordinary skill in the  
16 field was an individual with at least a bachelor of science  
17 degree in physics or electrical or mechanical engineering who  
18 also has a background in physics as generally taught to  
19 undergraduate engineering students, and at least four years of  
20 experience in illumination design or engineering; or an  
21 individual with at least a master's degree in optical  
22 engineering, physics or lighting, and two years of experience  
23 in illumination design and/or engineering field at the time  
24 the inventions were made.

13:46:13

25 Fallon contends that the level of ordinary skill in

1 the field was individuals with a bachelor of science or  
2 master's degree in general science or engineering with a  
3 strong background in physics and at least five years of  
4 experience in illumination design and/or engineering field; or  
5 an individual with a master's or doctorate degree in optical  
6 engineering, and two years of experience in illumination  
7 design and/or engineering field at the time the inventions  
8 were made.

13:46:36 9 It is for you to decide what the level of ordinary  
10 skill was at the time the inventions were made based upon the  
11 evidence presented to you in the case. In so doing, you may  
12 consider any evidence relating to this issue that is  
13 introduced at trial, including in particular any evidence  
14 introduced of:

13:46:52 15 1. The educational levels and experience of the  
16 investors at the time the inventions were made;

13:46:59 17 2. The education levels and experience of other  
18 persons working in the field of the inventions at the time the  
19 inventions were made, and particularly of any persons you may  
13:47:11 20 find to have independently made the inventions about the same  
21 time as the inventors;

13:47:15 22 3. The types of problems encountered in the field  
23 at the time the inventions were made;

13:47:15 24 4. The sophistication of the technology in the  
25 field at the time the inventions were made;

13:47:17 1           5.       The teachings and disclosures of prior art  
2 references such as patents and publications; and

13:47:23 3           6.       The teachings and disclosures of any of  
4 references that, while not prior art to the inventions,  
5 nonetheless contain teachings or disclosures of what the level  
6 of ordinary skill in the field may have been at the time the  
7 inventions were made.

13:47:39 8           The fourth question you must answer in determining  
9 whether the inventions were obvious at the time they were made  
10 is what evidence there is, if any, of additional  
11 considerations relating to obviousness or nonobviousness of  
12 the inventions. You may consider any evidence that was  
13 presented to you in this case regarding the presence or  
14 absence of the following factors in deciding whether each of  
15 iLight's inventions would have been obvious at the time they  
16 were made:

13:48:00 17           1.       whether the inventions proceeded in a direction  
18 contrary to accepted wisdom in the field;

13:48:07 19           2.       whether there was long felt but unresolved need  
20 in the art that was satisfied by the invention;

13:48:14 21           3.       whether others had tried but failed to make the  
22 inventions;

13:48:17 23           4.       whether others copied the inventions;

13:48:20 24           5.       whether the inventions achieved any unexpected  
25 results;

13:48:26 1           6.       whether the inventions were praised by others;  
2           7.       whether others have taken licenses to use the  
3 inventions;  
13:48:32 4           8.       whether experts or those skilled in art at the  
5 making of the inventions expressed surprise or disbelief  
6 regarding the inventions;  
13:48:40 7           9.       whether the products incorporating the  
8 inventions have achieved commercial success; and  
13:48:45 9          10.       whether others having ordinary skill in the  
10 field of invention independently made the claimed invention at  
11 or about the time the inventors made the inventions.  
13:48:55 12           Evidence that you find establishes the existence of  
13 items 1 through 8 tends to show that the inventions were not  
14 obvious at the time they were made. You may also consider the  
15 lack of evidence on these items to support a conclusion that  
16 the inventions would have been obvious to persons of ordinary  
17 skill in the art at the time it was made.  
13:49:17 18           Evidence of item 9, commercial success, also tends to  
19 show the inventions were not obvious at the time they were  
20 made, provided the success is directly attributable to the  
21 unique characteristics of the inventions or to the inclusion  
22 of the inventions in commercially successful products.  
23           If you do find that the Commercial success of the  
24 products is attributable to other factors such as advertising  
25 or commercial incentives, for example, commercial success



1 would not be attributable to the unique characteristics of the  
2 inventions, and any commercial success of the products  
3 incorporating the inventions has no bearing on whether the  
4 inventions were obvious.

13:49:48 5 Evidence establishing item 10, independent making of  
6 the inventions by others at about the same time as the  
7 inventors, may tend to show that the patented inventions were  
8 obvious at the time, provided the independent invention by  
9 others was done without knowledge of the patented inventions,  
10 or the efforts that went into the making of the patented  
11 inventions. The weight and relevancy of any independent  
12 making of the inventions at about the same time as the  
13 inventors that you may find depends on all of the  
14 circumstances at the time, including:

- 13:50:20 15 1. The similarities between the inventor's  
16 conception of the patent solution and the independent  
17 inventor's conception of the independently developed solution;
- 18 2. The time between the identification of the need  
19 for a solution to a problem by the inventors of the patented  
20 invention and the conception of the patented solution;
- 13:50:41 21 3. The time between the identification of a need  
22 for a solution to a problem by the independent inventors and  
23 the conception of the independently developed solution; and
- 24 4. The sequence of or time between the inventor's  
25 conception of the patented solution and the independent

1 inventor's conception of the independently developed solution.

2 In this case, Fallon contends that the inventions  
3 would have been obvious over a combination of prior art  
4 references. In determining whether or not the inventions  
5 would have been obvious to one of ordinary skill in the art at  
6 the time the inventions were made, you must consider whether  
7 or not the combination is more than the predictable use of  
8 prior art elements according to their established functions.

13:51:27 9 If a technique has been used to improve one device and  
10 a person of ordinary skill in the art would recognize that it  
11 would improve similar devices in the same way, using the  
12 technique would have been obvious unless the actual  
13 application is beyond that person's skill.

13:51:39 14 In answering this question, it will often be necessary  
15 to consider any apparent reason to combine the known elements  
16 in the manner the patent claims; teaching of multiple  
17 references; the effects of demands that were known to the  
18 community or that were present in the marketplace; and the  
19 background knowledge possessed by persons of ordinary skill in  
20 the art.

13:51:58 21 To find by clear and convincing evidence that the  
22 inventions would have been obvious, it is important for you to  
23 identify a reason that would have prompted a person of  
24 ordinary skill in the art to combine the elements as the  
25 inventions do. Advances that would have occurred anyway in

1 the ordinary course of development of the art may have been  
2 obvious, but you need not limit your consideration to the same  
3 problem or same prior art elements or the same solution  
4 adopted by the inventors.

13:52:23 5 You should consider the level of common sense and  
6 creativity of the persons of ordinary skill in the art that  
7 familiar items may have been obvious uses beyond their primary  
8 purposes, and that a person of ordinary skill in art may be  
9 able to fit the teachings of multiple patents and/or  
10 references together like pieces of a puzzle.

13:52:43 11 In certain circumstances, the fact that a combination  
12 was obvious to try might show that it was obvious under  
13 Section 103. For example, when there is a design need or  
14 market pressure to solve a problem and there are a finite  
15 number of identified predictable solutions, a person of  
16 ordinary skill has good reason to pursue the known options  
17 within his or her technical grasp. If this leads to an  
18 anticipated success, it is likely but not necessarily that the  
19 product is not of innovation but of ordinary skill and common  
20 sense.

13:53:23 21 The reason to select and combine features, the  
22 predictability of the results of doing so, and a reasonable  
23 expectation of success may be found in the teachings of prior  
24 art references themselves, in the nature of any need or  
25 problem in the field that was addressed by the patent, in the

1 knowledge of persons having ordinary skill in the field at the  
2 time, as well as in common sense or the level of creativity  
3 exhibited by persons of ordinary skill in the art. There need  
4 not be an explicit suggestion to combine references.

13:53:53 5 As a matter of law, each and every claim in a patent  
6 is presumed valid, and this presumption of validity exists at  
7 every stage of the litigation until such time, if ever, you  
8 find that the defendant has shown by a clear and convincing  
9 evidence that the patent is invalid. Yet the claims of a  
10 patent must be sufficiently definite that one skilled in the  
11 art could determine the precise limits of the claimed  
12 invention.

13:54:18 13 If a claim is found to be indefinite, the claim is  
14 invalid. The amount of detail required to be included in the  
15 claims depends upon the particular invention and the prior  
16 art. It is not to be evaluated in the abstract but in  
17 conjunction with the patent's disclosure.

13:54:34 18 Fallon contends that the claims of the patents-in-suit  
19 are invalid for indefiniteness. You must decide if the claims  
20 of these patents, read in light of the disclosure, reasonably  
21 apprised those skilled in art of the proper scope of the  
22 invention, and if the language is as precise as the subject  
23 matter permits. If they did not, the claim are indefinite.

13:54:54 24 Simply because some claims language may not be precise  
25 does not automatically render a claim invalid. When a word or

1 phrase of degree such as light reflective or light absorbtive  
2 is used, you must determine whether the patent disclosure  
3 provides some standard for measuring that degree. You must  
4 then consider whether one of ordinary skill in the art would  
5 understand what is covered when the claim is read in light of  
6 the disclosure. The primary purpose of this requirement is to  
7 ensure that the claims are written in a way that the public is  
8 given notice of the extent of the legal protection afforded by  
9 the patent so that interested parties can determine whether or  
10 not they infringe.

13:55:28 11 When I construed the claims at issue, I did not make  
12 any decision as to whether the claims were definite. Although  
13 the question of whether the patents are indefinite is one that  
14 I will decide, I will ask for your findings so that I can  
15 consider them in making my decision. You should make  
16 determinations on this issue as you would for any other issue  
17 in this case, because I will consider them seriously in making  
18 my determination.

13:55:54 19 I will now instruct you about the measure of damages.  
20 By instructing you on damages, I am not suggesting that iLight  
21 should win this case, on any issue. If you find that Fallon  
22 infringed any valid claim of the patents-in-suit, you must  
23 then determine the amount of money damages to be awarded to  
24 iLight to compensate it for the infringement. The amount of  
25 those damages must be adequate to compensate iLight for the

1 infringement. The damages you award are meant to compensate  
2 iLight and not to punish an infringer. Your damages award, if  
3 any, should put iLight in approximately the same financial  
4 position that it would have been in had infringement not  
5 occurred, but in no event may the damages award be less than a  
6 reasonable royalty. I will give you more detailed  
7 instructions on the calculation of a reasonable royalty  
8 shortly.

13:56:41 9 ILight has the burden to establish the amount of its  
10 damages. You should award only those damages that iLight  
11 establishes that it more likely than not suffered damages.

13:56:50 12 ILight is not entitled to damages that are remote or  
13 speculative. While iLight is not required to prove its  
14 damages with mathematical precision, iLight must prove them  
15 with reasonable certainty.

13:57:00 16 To the extent Fallon contends that the amount of  
17 damages should be reduced or offset, Fallon must prove the  
18 amount of such reduction or offset. When the amount of  
19 damages cannot be ascertained with precision, any doubts  
20 regarding the amount must be resolved against Fallon as the  
21 infringer.

13:57:17 22 In determining the amount of damages, you must  
23 determine when the damages began. Damages commence on the  
24 date that Fallon has both infringed and been notified of the  
25 patent. ILight and Fallon agreed that that date was January

1 2005.

13:57:30 2 If you find that iLight has established infringement,  
3 iLight is entitled to at least a reasonable royalty to  
4 compensate it for that infringement. A royalty is a payment  
5 made to iLight in exchange for the right to make, use or sell  
6 the claimed invention. A reasonable royalty is the amount of  
7 royalty payment that iLight and the infringer would have  
8 agreed to in a hypothetical negotiation taking place at the  
9 time when the infringing sales first began.

13:57:58 10 In considering this hypothetical negotiation, you  
11 should focus on what the expectations of iLight and the  
12 infringer would have been had they entered into an agreement  
13 at that time, and had they acted reasonably in their  
14 negotiations. You must also assume that both parties believed  
15 the patent was valid and infringed.

13:58:18 16 In addition, you must assume that iLight and the  
17 infringer were willing to enter into an agreement. Your role  
18 is to determine what that agreement would have been. The  
19 measure of damages is what royalty would have resulted from  
20 the hypothetical negotiation, and not simply what royalty  
21 either party would have preferred.

13:58:31 22 In this trial, you have heard evidence of things that  
23 happened after the infringing sales first began. That  
24 evidence can be considered by you only to the extent that that  
25 evidence aids in your assessing what royalty would have

1 resulted from a hypothetical negotiation. Although evidence  
2 of the actual profits Fallon made may aid you in determining  
3 the anticipated profits at the time of the hypothetical  
4 negotiations, you may not limit or increase the royalty based  
5 on the actual profits Fallon made.

13:58:54 6 In determining the reasonable royalty, you should  
7 consider all of the facts known and available to the parties  
8 at the time the infringement began. Some of the kinds of  
9 factors that you may consider in making your determinations  
10 are:

13:59:11 11 1. Whether iLight had an established royalty for the  
12 invention; whether, in the absence of an established royalty,  
13 there is evidence that tends to prove an established royalty;  
14 whether in the absence of such licensing history there are any  
15 royalty arrangements that were generally used or recognized in  
16 the particular industry at the time;

13:59:30 17 2. The nature of the commercial relationship between  
18 iLight and the licensee, such as whether they were competitors  
19 or whether their relationship was that of an inventor and a  
20 promoter;

13:59:40 21 3. The established profitability of the patented  
22 product, its commercial success, and its popularity at the  
23 time;

13:59:49 24 4. Whether iLight had an established policy of  
25 granting licenses or retaining the patented invention as its



1 exclusive right, or whether iLight had a policy of granting  
2 licenses under special conditions designed to preserve its  
3 monopoly;

14:00:06 4 5. The size of the anticipated market for the  
5 invention at the time the infringement began;

14:00:10 6 6. The duration of the patent and of the license, as  
7 well as the terms and scope of the license, such as whether it  
8 is exclusive or nonexclusive or subject to territorial  
9 restrictions;

14:00:14 10 7. The rates paid by the licensee for the use of  
11 other patents comparable to the plaintiff's patent;

14:00:19 12 8. Whether the licensee's sale of the patented  
13 invention promotes sales of its other products or whether the  
14 invention generates sales to the inventor of his nonpatented  
15 items;

14:00:31 16 9. The utility and advantages of the patented  
17 property over the old modes or devices, if any, that had been  
18 used for working out similar results;

14:00:42 19 10. The extent to which the infringer used the  
20 invention and any evidence probative of the value of such  
14:00:46 21 use;

14:00:49 22 11. The portion of the profits in the particular  
23 business that is customarily attributable to the use of the  
24 invention and analogous inventions;

14:00:56 25 12. The portion of the profits that should be credited

1 to the invention as distinguished from such nonpatented  
2 elements, the manufacturing process, business risks, or  
3 significant features or improvements added by the infringer;

4 13. The opinion or testimony of qualified experts of  
5 iLight and Fallon; and

14:01:15 6 14. Any other factors which in your mind would have  
7 increased or decreased the royalty the infringer would have  
8 been willing to pay and iLight would have been willing to  
9 accept, acting as normally prudent business people.

14:01:28 10 No one factor is dispositive, and you can and should  
11 consider the evidence that has been presented to you in this  
12 case on each of these factors. The final factor establishes  
13 the framework which you should use in determining a reasonable  
14 royalty. That is, the payment that would have resulted from a  
15 negotiation between iLight and Fallon taking place at the time  
16 the infringing sales first began.

14:01:50 17 In determining the amount of damages, you must  
18 determine when the damages began. Damages commenced on the  
19 date that Fallon has both infringed and been notified of the  
20 patent. iLight and Fallon agree that the date was January  
21 2005.

14:02:04 22 The only issues in this action that you must decide  
23 are as follows:

14:02:08 24 1. Whether iLight has established by a preponderance  
25 of the evidence that Fallon infringed any valid claim of

1 iLight's '238, '262 or '970 patents;

14:02:20 2 2. Whether Fallon has established by clear and  
3 convincing evidence that the asserted claims of the '238, '262  
4 and '970 patents are invalid as anticipated;

14:02:32 5 3. Whether Fallon has established by clear and  
6 convincing evidence that the asserted claims of the '238, '262  
7 and '970 patents are invalid as obvious;

14:02:43 8 4. Whether Fallon has established by clear and  
9 convincing evidence that the asserted claims of the '238, '262  
10 and '970 patents are invalid as indefinite;

14:02:54 11 5. If you determine that Fallon infringed any valid  
12 claim of iLight's '238, '262 or '970 patents, the amount of  
13 damages; and

14:03:02 14 6. If you determine that Fallon infringed any valid  
15 claim of iLight's '238, '262 or '970 patents, whether iLight  
16 has established by clear and convincing evidence that the  
17 infringement was willful.

14:03:22 18 Any verdict must represent the considered judgment of  
19 each juror. In order to return a verdict, it is necessary  
20 that each juror agree thereto. In other words, your verdict  
21 must be unanimous.

14:03:28 22 It is your duty as jurors to consult with one another  
23 and to deliberate in an effort to reach agreement if you can  
24 do so without violence to your individual judgment. Each of  
25 you must decide the case for yourself, but only after

1 impartial consideration of the evidence in the case with your  
2 fellow jurors.

14:03:40 3 In the course of your deliberations, do not hesitate  
4 to reexamine your own views and change your opinion if  
5 convinced it is erroneous. But do not surrender your honest  
6 conviction as to the weight or effect of the evidence solely  
7 because of the opinion of your fellow jurors or for the mere  
8 purpose of returning a verdict.

14:03:56 9 Remember at all times, you are not partisans. You are  
10 judges -- judges of the facts. Your sole interest is to seek  
11 the truth from the evidence in the case.

14:04:06 12 Upon retiring to the jury room, you should first  
13 select one of your number to act as your foreperson who will  
14 preside over your deliberations and will speak for you here in  
15 court. A verdict form has been prepared for your convenience.  
16 A copy of these instructions and all exhibits in the case will  
17 also be provided to you.

14:04:20 18 When you have reached unanimous agreement as to your  
19 verdict, you will have your foreperson fill it in, date and  
20 sign it, and then return to the courtroom.

14:04:27 21 If, during your deliberations, you should desire to  
22 communicate with the Court, please reduce your message or  
23 question to writing, signed by the foreperson, and pass the  
24 note to the Marshal, who will bring it to my attention. I  
25 will then respond as promptly as possible, either in writing

1 or having you return to the courtroom so I can address you  
2 orally. I caution you, however, with regard to any message or  
3 question you might send, that you should never state or  
4 specify the vote of the jury at the time.

14:04:57 5 You may now retire to the jury room. Shortly you will  
6 receive a copy of the instructions, which is this; a copy of  
7 the verdict form, which is this; and all of the exhibits  
8 admitted into the record.

14:05:10 9 The Marshal will escort you to the jury room, and you  
10 can take all of that with you.

14:05:39 11 (Jury out at 2:05 p.m.)

14:05:41 12 THE COURT: Any objections to the instructions as  
13 read?

14:05:44 14 MR. VEZEAU: Not from the plaintiff, Your Honor.

14:05:45 15 THE COURT: From the defense?

14:05:47 16 MR. KITTREDGE: No, Your Honor.

14:05:52 17 THE COURT: All I ask is that, if you all are going to  
18 leave the immediate area, leave your cell phone number where  
19 we can reach somebody. We're in recess.

17:27:21 20 (Recess. Reconvened at 5:30 p.m.)

17:40:38 21 THE COURT: Counsel, I have received two notes from  
22 the jurors. One note is:

17:40:46 23 Starving and want cigarette.

17:40:52 24 The other one is: If we are not unanimous about any  
25 claim, does that mean no?

17:40:58 1 I'm going to bring the jurors in, I'm going to tell  
2 them what their options are. The options are we can honor the  
3 request of one of the jurors to come back tomorrow at 9:00.  
4 If they want to stay, we can order them dinner and they can  
5 continue to deliberate. If they are not unanimous as to any  
6 one claim, the case has been tried with seven days of proof  
7 and extended closing arguments, there are a lot of exhibits,  
8 complex instructions, and the Court doesn't feel they have  
9 deliberate long enough to come to any final vote on this, and  
10 would suggest to them if they are tired that they come back in  
11 the morning.

17:41:39 12 Any objection, either side?

17:41:41 13 MR. VEZEAU: Not from the plaintiff, Your Honor.

17:41:43 14 MR. KITTREDGE: No objections from the defense.

17:43:05 15 THE COURT: You can bring the jury in. While they are  
16 waiting, there are some matters that were given to me during  
17 the course of the trial, and I will leave it to counsel if  
18 they want to mark any of these for identification.

17:43:19 19 One is an objection to Carl Degen's revised narrative.  
20 The other is a letter from Hathaway to Leah white that was  
21 excluded. The other ones are minutes from an iLight board  
22 meeting that was submitted on a privilege issue. There is a  
23 transcript of a videotaped deposition of Carl -- Douglas Bagin  
24 that was given to the Court I guess in connection with the  
25 objections that were Exhibits 71, looks like Defendant's

1 Exhibit 71 that was submitted to the Court I think it was in  
2 connection with one of the -- I'm not sure.

17:44:14 3 But then there is the deposition testimony of  
4 Elizabeth Randgaard, and I think it was concerned the e-mails  
5 is what Exhibit 71 was. So I will leave these up here. You  
6 all can inspect them. I think the minutes were from the  
7 plaintiff, as I recall. You all can look at those. If there  
8 is any of this you want filed for the record or marked for  
9 identification, we can do that. The record is closed, but --

17:45:11 10 (Jury in.)

17:45:14 11 THE COURT: You can be seated. Ladies and gentlemen  
12 of the jury, I have shared your note with the attorneys and  
13 the parties. And the Court's response is, in essence, as I  
14 said earlier, you are kind of your own bosses. If you need a  
15 cigarette, for the juror who wants a cigarette and needs to  
16 eat, if you all want to stay later, we can order you dinner  
17 and have it brought in. If you want to have a cigarette  
18 break, the Marshal can escort you outside and let you get a  
19 cigarette. While you are outside, you can't -- the rest of  
20 the jurors can't deliberate until the juror comes back after a  
21 smoke.

17:45:55 22 As to the other note about not unanimous, this case  
23 has had seven days of proof, extended argument, extended jury  
24 charge and a lot of exhibits. So the Court feels there is  
25 really need for further deliberations. It's too early to take

1 a view of the matter that you have the right now.

17:46:16 2 I think you need to continue to deliberate with one another,  
3 and as the Court's instructions say, reexamine your own views  
4 and consider the views of the others. But don't surrender  
5 your honest conviction if you feel that way.

17:46:27 6 I'm going to let you all go to the little small room,  
7 and you all decide what you want to do, whether A, come back  
8 in the morning at nine o'clock and start all over again; or  
9 two, take a recess and let the juror who wants to smoke,  
10 smoke; three, if the jury wants to stay late, we'll order  
11 pizza and order anything else you all want and continue to  
12 deliberate. If you all will step into the ante room and have  
13 your foreperson come back in and let us know what you want to  
14 do. Okay?

17:47:28 15 (Jury out.)

17:47:31 16 THE COURT: You all can have a seat. We'll be in  
17 recess until the jury is back.

17:49:51 18 (Recess.)

17:51:21 19 THE COURT: The juror's note says:

17:51:24 20 We would like to leave for the evening and return at  
21 9:00 a.m. Thursday.

17:51:28 22 If you will bring the jurors in, that's what I will  
23 do. Do you all want them to reconvene? Do you all want to  
24 see them reconvene at 9:00 or just leave it to the jury?

17:51:59 25 MR. VEZEAU: No.



17:52:01 1 MR. KITTREDGE: Just leave it to the jury, that's  
2 fine.

17:52:05 3 THE COURT: Okay.

17:52:12 4 (Jury in.)

17:52:15 5 THE COURT: All right, ladies and gentlemen of the  
6 jury. I have shared your note with the Marshal. You are free  
7 to go this evening. The Court will give you the same  
8 instruction. Please do not discuss this case with anyone  
9 else, your family or friends, until you have all returned to  
10 the jury room. And I will ask the foreperson of the jury to  
11 make sure that you do not begin deliberations until all jurors  
12 are present. Then once all jurors are present, you can start  
13 your deliberations to make sure you are hearing all your --  
14 each other's views about the matter. You are free to go. You  
15 can pass your pads to the Marshal. He will take custody until  
16 you return in the morning. You are free to go.

17:53:08 17 (Jury out.)

17:53:17 18 THE COURT: I would suggest to the parties that -- you  
19 all are available by cell phone, but the closer it gets about  
20 11:30 about 11:45, I think it would be appropriate if you all  
21 start returning to the courtroom so if there is any report  
22 from the jury about that time, we won't have to wait 15 or 20  
23 minutes.

17:53:39 24 MR. VEZEAU: Very good.

17:53:42 25 THE COURT: We're in recess.

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REPORTER'S CERTIFICATE

I, Peggy G. Turner, Official Court Reporter for  
the United States District Court for the Middle  
District of Tennessee, with offices at Nashville, do  
hereby certify:

That I reported on the Stenograph machine the  
proceedings held in open court on April 29, 2009, in the  
matter of ILIGHT V. FALLON, Case No. 2:06-0025; that said  
proceedings in connection with the hearing were reduced to  
typewritten form by me; and that the foregoing transcript,  
Pages 1118 through 1270, is a true and accurate record of said  
proceedings.

This the 21st day of May, 2009.

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S/Peggy G. Turner, RPR  
Official Court Reporter